

UNIVERSITY OF CAPE TOWN



**CLOSING “THE MEDITERRANEAN CEMETRY”: WHETHER THE
EUROPEAN AGENDA ON MIGRATION (IMMEDIATE ACTION) AIMED
AT CURBING THE AFRICA-EU MIGRATION “CRISIS” IS
INTERNATIONAL LAW COMPLIANT?**

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations/research papers, including those relating to length and plagiarism, as contained in the rules of this university, and that this dissertation/research paper conforms to those regulations.

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ABSTRACT

The aim of the thesis is to establish whether the European Agenda on Migration (EAM) (Immediate Action),¹ formulated to curb the Africa-EU irregular migration “crisis” complies with international law. The thesis commences by arguing that migration today is a bastion of state sovereignty² though fettered to a very limited extent by human rights³, international law and states’ inter-dependence.⁴ The thesis then discusses the right to asylum and the principle of non-refoulement under international law. This is followed by a discussion on the EU as “sui generis” supranational entity that champions human rights and the rule of law globally followed by a review of its “sui generis” immigration law and rules under which the EU and member states share competence. Fundamental terminologies in the migration discourse: Migrants, Irregular Migrants, Refugees and Asylum-Seekers are defined. A critique of The Refugee Convention⁵ is done, revealing its parochial,⁶ Eurocentric⁷, racist,⁸ and sexist⁹ nature, factors that to a large extent make it divorced from the realities of today’s refugee dynamics yet the Convention is the centrepiece of international refugee protection.¹⁰ The thesis then interrogates the Africa-EU irregular mass-migration; the push and pull factors as well as the general modus operandi are reviewed. The generally recognised routes; Western Mediterranean, Central Mediterranean and West African which facilitate the

¹ The European Commission, *Communication from The Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration*, Brussels, 13.5.2015, COM(2015) 240 final, Page 2, Para 1, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf accessed 11/8/2017 at 18.10

² Catherine Dauvergne, *Sovereignty, Migration and the Rule of Law in Global Times*, *The Modern Law Review*, Volume 67, Issue 4, July 2004, Pages 588–615, Page 588, Para 1, <http://onlinelibrary.wiley.com.ezproxy.uct.ac.za/doi/10.1111/j.1468-2230.2004.00501.x/full> accessed 12/9/2017 at 21.36

³ Richard Plender, *International Migration Law*, Revised 2nd Edition, 1988, Martinus Nijhoff Publishers, Dordrecht, Page 62, Para 1

⁴ *Ibid* at 61 para 3

⁵ UNGA, *Convention Relating to the Status of Refugees*, 1951

⁶ Gillian McFadyen, *The Contemporary Refugee: Persecution, Semantics and Universality*, eSharp, Special Issue: The 1951 UN Refugee Convention - 60 Years On (2012), SSN: 1742-4542, pp. 9-35, Page 14, Para 2, http://www.gla.ac.uk/media/media_234569_en.pdf accessed 11/9/2017 at 13.07

⁷ Rafiqul Islam and Jahid Hossain Bhuiyan (Eds.) *An Introduction to International Refugee Law*, 2013, Martinus Nijhoff Publishers, Leiden, Page 23, Para 2

⁸ B.S Chimni, “*The Geopolitics of Refugee Studies: A View from the South.*” *Journal of Refugee Studies* 11(4): 350–374 page 351

⁹ Asha Hans, *Gender, Camps and International Norms*, Mahanirban Calcutta Research Group Library, Page 69, http://www.mcrg.ac.in/rw%20files/rw32/3.asha_hans.pdf accessed 11/9/2017 at 14.40

¹⁰ UNGA supra note 4, *Introductory Note by the office of the UNHCR*, para 1

migration are assessed. Lastly, the thesis then analyses the compliance of the EAM (Immediate Action) with international law. Each of the Immediate Actions; 1) Saving Lives at Sea 2) Targeting Criminal Smuggling Networks 3) Relocation 4) Resettlement 5) Working in partnership with third countries 6) Using the EU's tools to help frontline are subjected to the relevant international law governing them to test their compliance with international law. Final conclusions of the thesis are then drawn.

ACRONYMS AND ABBREVIATIONS

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CJEU	Court of Justice of the European Union
CSDP	Common Security and Defence Policy
DARIO	Draft Articles on the Responsibility of International Organisations
DASR	Draft Articles on State Responsibility
DCR	Dutch Council for Refugees
EAM	European Agenda on Migration
EASO	European Asylum Support Office
EC	European Commission
ECA	European Court of Auditors
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
EEAS	European External Action Service
EUAFR	European Union Agency for Fundamental Rights
FRONTEX	European Border and Coast Guard Agency
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICERD	International Covenant on the Elimination of All Forms of Racial Discrimination
ICMSAR	International Convention on Maritime Search and Rescue

NIHR	Netherlands Institute for Human Rights
OHCHR	Office of the High Commissioner for Refugees
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on the Law of Treaties
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly

CHAPTER 1 INTRODUCTION TO THE STUDY

1:1 INTRODUCTION

While having ancient historical roots in the Trans-Saharan trade, the foundations of contemporary Trans-Saharan migration were laid in the 1970s and 1980s when (former) nomads and traders started migrating to work at construction sites and the oil fields of southern Algeria and Libya.¹¹ This migration was fundamentally influenced in the 1990s was by the radical Pan-Africanist foreign policy of Muammar Gadhaffi, a policy that was conceivably influenced by the embargoes imposed on Libya by the UN Security Council between 1992- 2000.¹² Feeling betrayed by his fellow Arab leaders, Gadhaffi re-crafted himself as an African leader, welcoming Sub-Saharan Africans (Sub-Saharans) to work in Libya in the spirit of Pan-Africanism.¹³ However, attitudes towards immigrants hardened in Libya following an anti-immigrant backlash against Sub-Saharans in 2000, which resulted into the deaths of hundreds of them.¹⁴ The government responded to the strong resentment against the Sub-Saharans through arbitrary detention, physical abuse, forced repatriations, etc.¹⁵ Resultantly, irregular migration of Sub-Saharans into Libya commenced, spreading to other North African countries as well. (Algeria, Morocco and Tunisia)¹⁶

In the 1990s, following the establishment of the Schengen Area in Europe, the Southern EU states were pressurised by their Northern counterparts into securitisation and the tightening of their borders with their African neighbours hence the introduction of visa requirements for Maghrebis.¹⁷ The result was the commencement of irregular migration into the EU by the Maghrebis.¹⁸ Libya's allure

¹¹ Hein De Haas, *The Myth of Invasion: The Inconvenient Realities of African Migration to Europe*, Page 1307, Para 2, Third World Quarterly, Vol. 29, No. 7, Globalisation and Migration: New Issues, New Politics? (2008), pp. 1305-1322, Taylor and Francis Ltd, <http://www.jstor.org/stable/20455111> accessed 22/9/2017 at 8.12

¹² Ibid page 1307 para 2

¹³ Ibid page 1307 para 3

¹⁴ Ibid page 1307 para 4

¹⁵ Ibid

¹⁶ Ibid page 1307 para 4 -1308 para 2

¹⁷ Ruben Andersson, *Europe's Failed 'Fight' against Irregular Migration: Ethnographic notes on a Counterproductive Industry*, Journal of Ethnic and Migration Studies, Routledge, Pages 1056--1057 <http://dx.doi.org/10.1080/1369183X.2016.1139446> accessed 22/9/2017 at 8.29

¹⁸ Hein de Haas, *Irregular Migration from West Africa to the Maghreb and the European Union, An Overview of Recent Trends* (Prepared for IOM) Page 16 para 4, www.unhcr.org/49e479ca0.pdf (accessed 1/1/18 11.10)

having gone, around 2000; Sub-Saharan Africans began joining Maghrebis in the irregular migrations into EU soon thereafter outnumbering the Maghrebis.¹⁹ Moreover, many Sub-Saharan Africans began crossing directly from Libya to the EU hence effectively making Libya a departure country.²⁰ Today, Sub-Saharan Africans are the largest number of irregular migrants journeying into the EU, exceeding the Maghrebis.²¹

Today, the EU claims to be going through a “migration crisis”.²² The arrival in Europe of more than 1 million asylum-seekers in 2015 unsettled the EU like no crisis before. The EU’s current institutional and legislative arrangements were clearly not up to dealing with the huge influx of asylum seekers, laying bare the deep divisions among the member states.²³ The deplorable handling of the crisis by the EU has formed serious cracks in the bloc. The Dublin Regulations²⁴ that underpin the immigration policy of the EU and the Schengen open border system that sustains the Common Market in the bloc were suspended.²⁵ Fences and barriers have been erected as well as the temporary border closures within the Schengen open-border zone.²⁶ The crisis was allegedly manipulated by the Leave side in the UK referendum whose result initiated “Brexit”. The UK exit can arguably cause a domino effect in the EU with more states seeking to leave the bloc, a scenario that would seal the fate of the EU.²⁷

¹⁹ Haas op cit note 18 page 16 para 4

²⁰ Haas op cit note 11 page 1308 para 1

²¹ The European Commission, *Migration on the Central Mediterranean route ; Managing flows, Saving lives, Joint Communication to the European Parliament, The European Council and the Council*, 25th January 2017, Brussels, Page 4, Para 1, <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation->

²² European Commission, *Migration, Background* https://ec.europa.eu/commission/priorities/migration_en accessed 22/9/2017 at 9.23

²³ Stefan Lehne, *How the Refugee Crisis Will Reshape the EU*, 4th February 2016, Carnegie Europe, <http://carnegieeurope.eu/2016/02/04/how-refugee-crisis-will-reshape-eu-pub-62650> accessed 13/9/2017 at 14.10

²⁴ Euro-Mediterranean Human Rights Network, *Prioritising Border Control over Human lives violations of the Rights of Migrants and Refugees at Sea*, Policy Brief, 2014, Copenhagen, Page 7, Para 1

²⁵ European Commission, *Back to Schengen: Commission proposes that the Council allows Member States to maintain temporary controls for another three months*, 25th January 2017, http://europa.eu/rapid/press-release_IP-17-124_en.htm accessed 13/9/2017 at 11.58

²⁶ Matthew Holehouse, *Refugee crisis: Austria erects fence in new strain on Schengen*, The Telegraph Newspaper, 8th December 2015, <http://www.telegraph.co.uk/news/worldnews/europe/austria/12040643/Refugee-crisis-Austria-erects-fence-in-new-strain-on-Schengen.html> accessed 13/9/2017 at 12.05

²⁷ RT, *Refugee crisis, decisive" for Brexit, will break EU apart – Austrian FM*, 30th June 2016, <https://www.rt.com/news/349055-refugee-crisis-brexit-austria/> accessed 13/9/2017 at 12.11

The following reasons give an insight into why there currently is an “EU migration crisis”; i) the NATO led overthrow of Gadhafi and the subsequent instability responsible for the current failed state status of Libya.²⁸ The proximity of Libya and the prevailing lawlessness has made it the gateway to EU for irregular migrants.²⁹ ii) The global refugee crisis.³⁰ UNHCR statistics portray that there are more displaced people today than after the 2nd World War.³¹ iii) The inherent defects of the EU Asylum and Refugee Policy. As per Andersson, the Schengen Agreement didn’t entail a common asylum and refugee policy that would ensure EU member states collectively bear the burden of refugees and asylum-seekers in case of an influx; Consequentially, the EU Southern States (Greece and Italy) have solely bore the EU migration pressure.³² Moreover, the Dublin Regulations posit that asylum requests must be made and assessed in the 1st EU state of entry, except when family members are established in another member state.³³ iv) The closure of legal pathways into the EU especially after establishing the Schengen Area, which inevitably encouraged irregular migration.³⁴ v) The lack of solidarity among the EU states in managing the surge in asylum-seekers.³⁵

Currently, the principal fueler of the EU migration “crisis” is essentially the Africa-EU irregular mass-migration most specifically the Central Mediterranean Route.³⁶ (Discussed in depth in Chapter 4) The closure of the Eastern Mediterranean and

²⁸ Frontex, *Central Mediterranean Route*, <http://frontex.europa.eu/trends-and-routes/central-mediterranean-route/> accessed 22/9/2017 at 10.41

²⁹ Ibid

³⁰ According to the UNHCR, the world is currently experiencing a global refugee crisis. Since 2011, when the UNHCR announced 42.5 million forcibly displaced people globally, these numbers have risen sharply each year, from 45.2 million in 2012 to 51.2 million in 2013 and 59.5 million in 2014. In 2015, forced displacement reached 65.3 million individuals by the end of 2015, UNHCR, *Global Trends, Forced Displacement in 2015*, Pages 5-6, www.unhcr.org/576408cd7.pdf accessed 9/13/2017 at 12.23

³¹ Euan Mckirdy, *UNHCR Report: More displaced now than after WWII*, CNN, <http://edition.cnn.com/2016/06/20/world/unhcr-displaced-peoples-report/index.html> accessed 22/9/2017 at 9.39

³² Andersson op cit note 17 at 1058 para 3; ECtHR, *M.S.S. v Belgium and Greece [GC]*, 30696/09, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22002-628%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-628%22]}) (accessed 4/2/18)

³³ Euro-Mediterranean Human Rights Network op cit note 24

³⁴ Andersson op cit note 17 at 1058 para 3

³⁵ Steve Scherer, *Italy chides EU partners for lack of solidarity in migrant crisis*, Reuters, <https://www.reuters.com/article/us-refugee-day-italy-migrants/italy-chides-eu-partners-for-lack-of-solidarity-in-migrant-crisis-idUSKBN19B281> accessed 22/9/2017 at 10.09

³⁶ Frontex op cit note 28

West Balkans routes leaves the Central Mediterranean Route as the principal fueler of the “crisis”.³⁷

It must be noted that regardless of the internal pressures the EU is currently facing, owing to the surge in migrants and asylum-seekers, the general western perception that the EU is facing a *sui generis* migration “crisis” and that the EU is bearing the brunt of the current global refugee crisis ³⁸ is utterly deceptive. The increasing numbers of refugees arriving in Europe rather than remaining in their regions creates the impression that Europe is experiencing an unprecedented crisis. Two-thirds of the world’s 65.6 million displaced remain within the borders of their own countries. If there is a crisis, it’s one of internal displacement in the developing world.³⁹ Globally, 8 out of the 10 top refugee hosting countries are in Africa, with the remaining 2 in the Middle East.⁴⁰ Uganda for example took in more refugees in 2016 than the total number that crossed the Mediterranean into Europe.⁴¹

Under the above backdrop, the EU in a bid to streamline all efforts aimed at addressing the migration “crisis” formulated the EAM.⁴² The Agenda forms the backbone of this thesis. The thesis strictly limits itself to the Immediate Actions under the EAM aimed at addressing the Africa-EU irregular mass-migration.⁴³

³⁷ European Commission, *Irregular Migration via the Central Mediterranean; From Emergency Responses to Systemic Solutions*, Issue 22, 2nd February 2017, European Political Strategy Centre, page 1 para 3 https://ec.europa.eu/epsc/publications/strategic-notes/irregular-migration-central-mediterranean_en (accessed 16/6/2017 20.59)

³⁸ “...Let me now turn to the migration and refugee crisis... because of geography... the most responsibility is and will continue to be placed on Europe...” European Council President Donald Tusk, European Council, *Remarks by President Donald Tusk before the G7 summit in Ise-Shima, Japan*, <http://www.consilium.europa.eu/en/press/press-releases/2016/05/26-tusk-remarks-before-g7-japan/> accessed 13/9/2017

³⁹ Elizabeth Ferris, *Unpacking the numbers on Global Refugees*, 20th June 2017, The Brookings Institution, <https://www.brookings.edu/blog/order-from-chaos/2017/06/20/unpacking-the-numbers-on-global-refugees/> accessed 13/9/2017 at 12.26

⁴⁰ UNHCR, *Poorer countries host most of the forcibly displaced, report shows*, February 2016, <http://www.unhcr.org/news/latest/2017/2/58b001ab4/poorer-countries-host-forcibly-displaced-report-shows.html> accessed 24/9/2017 at 16.42

⁴¹ Conor Gaffey, *Uganda took in more refugees in 2016 than many wealthy European countries do all year*, Newsweek, New York, 26th January 2017, <http://europe.newsweek.com/uganda-took-more-refugees-crossed-mediterranean-2016-aid-agency-548508?rm=eu> accessed 13/9/2017 at 13.19

⁴² European Commission supra note 21 page 4 para 1

⁴³ Ibid

1:2 STATEMENT OF THE PROBLEM

The EU claims to be experiencing a migration “crisis”.⁴⁴ In order to manage it, the EAM was formulated with an Immediate Action plan as well as a longer term plan.⁴⁵ The Problem is that the EAM is to a greater extent plausibly incompatible with international law, moreover, the EAM doesn’t meet the standard of compliance with international law expected of the EU, which has assumed the role of a global champion for human rights, rule of law and democracy.⁴⁶

1:3 RESEARCH QUESTIONS

The following are the primary research questions of this thesis:

1. What informs the migration law and policy of states?
2. How does the EU immigration law and policy function?
3. Does an Africa-EU irregular mass-migration exist?
4. Whether the EAM (Immediate Action) and its implementation, aimed at curing the Africa-EU irregular mass-migration and consequently the EU migration “crisis” conform to international law?
5. Whether the EU and member states are plausibly liable for breaches of international law whilst implementing the EAM (Immediate Action) addressing the Africa-EU irregular mass-migration.

1:4 OBJECTIVES OF THE STUDY

By interrogating the above Research Questions, I intend to;

1. Disclose that the migration laws and policies are to a very large extent governed by state sovereignty though today human rights, international law and the inter-dependence of states have to a very limited extent eroded the primacy of state sovereignty.

⁴⁴ European Commission supra note 21

⁴⁵ Ibid

⁴⁶ European Union, *Treaty of Lisbon amending the Treaty on the EU and the Treaty establishing the European Community*, 2007, Article 2 ; European Union, *Fostering Human Rights among European (External and Internal Policies)*, Policy Brief, October 2014, Para 1, http://www.fp7-frame.eu/wp-content/materiale/policy_brief/01-FRAME%20Policy%20Brief%20No%20%201%20--%2017%20November%202014.pdf (accessed 8/1/17 8.45)

2. Reveal the *sui generis* nature of the EU immigration law and policy under the EU supranational arrangement, in which the EU and member states exercise shared competence in relation to immigration.
3. Show that the EU doesn't face a unique migration "crisis" since currently there's a global refugee crisis, whose brunt is borne by developing countries in the Global South.
4. Establish that there exists an Africa-EU irregular mass-migration; a mixed migration involving "genuine" asylum-seekers and economic migrants while revealing that the Africa-EU irregular mass-migration is the principal fueler of the EU migration "crisis".
7. Reveal the double standards and arguable hypocrisy of the EU in relation to human rights and the rule of law.
8. Demonstrate the liability of the EU and member states under international law, emanating from the EAM (Immediate Action) and its implementation in relation to the Africa-EU irregular mass-migration.

1:5 RESEARCH METHODOLOGY

The Research was essentially Qualitative and Library-based. The Research predominantly relied on primary sources. The gist of the thesis essentially is an analysis of the EAM, a European Commission document. The bulk of the literature used encompasses those authored by EU institutions and agencies notably the European Commission, the Council, the European Council. These documents were indispensable for the purpose of gaining insights into the EU vision for dealing with the Africa-EU irregular migration and the EU migration "crisis" generally as well as for tracking the implementation of the EAM Immediate Actions. "Hard" International law was extensively used, primarily entailing International law treaties, jurisprudence of international, regional and national courts as well as the jurisprudence of international treaty bodies.

Secondary sources used prominently include textbooks, scholarly journals, publications by universities and NGOs, newspapers and relevant online publications and articles. The author endeavoured to use reliable and reputable secondary sources and publishers such as Oxford and Cambridge University Presses, Routledge, The

Guardian, The Telegraph (Newspapers), The Brookings Institute, Amnesty International, etc.

A quantitative methodology is used to a very limited extent mainly to portray mainly the statistics of migrants e.g. the statistics of migrants journeying into the EU, statistics of migrants that died while irregularly crossing into the EU, etc.

1:6 LIMITATIONS OF THE RESEARCH

Firstly, the author never ventured into the field to personally analyse the situation as well as verify the data and studies used in the research. Secondly, owing to time and space limitations, the scope of the thesis is limited to the Immediate Action of the EAM and the Africa-EU migration, mainly the Central Mediterranean Route (North Africa to Italy) since it's the route most used by the migrants involved in the migration. Even other Africa-EU routes, The Eastern Mediterranean and West African routes are examined minimally.

It's worth recalling that the EAM also addresses European irregular migration routes that feed the migration "crisis" i.e. the Eastern Mediterranean and the West Balkans routes.⁴⁷ The EAM also has a long term agenda. (Long term actions) Both aren't examined by the thesis. The gaps left by the study are worthy of exploration as there is hardly any literature on them.

1:7 SIGNIFICANCE OF THE STUDY

First and foremost, there's literally no literature that comparatively examines the EAM and international law.⁴⁸ The thesis, by subjecting the EAM to international law, credibly breaks new ground in legal research.

Secondly, the literature on the inherent deficiencies of the Refugee Convention that make it unfit for purpose today, especially in the face of the current asylum and refugee situation is very limited.⁴⁹ The thesis advances research that questions the

⁴⁷ European Commission op cit note 1 page 5 para 6, page 8, para 2

⁴⁸ A search of "The European Agenda on Migration" and "International law" on Google Scholar produces only 1 article with a title bearing the EAM moreover, it doesn't explore the relationship between the agenda and international law,
https://scholar.google.com/scholar?start=0&q=%22European+Migration+Agenda%22+AND+%22International+law%22&hl=en&as_sdt=0,5 accessed 24/9/2017

⁴⁹ Some of the arguably most authoritative text books on asylum and refugee law like Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd Edition, 1996, Oxford University Press, Oxford, Plender op cit note 3, Hathaway op cit note 72, don't discuss or even highlight the inherent deficiencies in the Refugee Convention;

fitness for purpose of the Convention considering its racist,⁵⁰ androcentric⁵¹ and parochial⁵² nature, while arguing for the adoption of a new, more humanitarian refugee Convention, cognisant of the hostility that most states are likely to have towards such a move.⁵³

Thirdly, the EU is generally presented as a normative power and humanitarian actor.⁵⁴ The thesis uses the EAM and its implementation to probe the normative and humanitarian credentials of the EU. The study is hence significant since it uses the EU response to the migration “crisis” to establish whether the EU upholds its ideals and values, most especially when dealing with emergencies. This potentially reveals the double standards of the EU in relation to human rights and the rule of law, considering that the EU often criticises and “lectures” states especially in the developing world on human rights and the rule of law.⁵⁵

Lastly the study dispels the portrayal, mainly in the West that the EU bears the brunt of the current global refugee crisis. ⁵⁶ The study produces evidence which shows that developing states in the Global South bear the brunt of the crisis.⁵⁷

⁵⁰ Chimni op cite note 8

⁵¹ Hans op cit note 9

⁵² McFadyen op cit note 6

⁵³ Thomas G Weiss & Rorden Wilkinson, *International Organisation and Global Governance*, Routledge, London, 2014 page 672

⁵⁴ European Union, supra note 46; The unique combination of “historical context, hybrid polity and legal constitution” makes the EU normatively different than other actors, Ian Manners, *Normative Power Europe: A Contradiction in Terms?* Common Market Studies, 2002, 40, 235-258 pages 241-242

⁵⁵ Ionna Karagianni, *European Parliament discusses human rights in ACP countries*, Europe External Policy Advisors, 31st January 2018, <http://www.eepa.be/?p=2016> (accessed 5/2/2018)

⁵⁶ European Council supra note 38

⁵⁷ UNHCR, *Global Trends, Forced Displacement in 2015*, www.unhcr.org/576408cd7.pdf (accessed 9/13/2017 12.23); Gaffey op cit note 41

CHAPTER 2: MIGRATION, STATE SOVEREIGNTY, ASYLUM AND THE EU

INTRODUCTION

This Chapter examines the relationship encompassing migration, state sovereignty and asylum. The Chapter opens by defining migration before making the connection between migration and state sovereignty (the ultimate determinant of the migration laws and policies of states) Asylum is then defined followed by an investigation into whether a right to asylum exists under international law. The principle of non-refoulement is then discussed, (a principle largely considered as customary international law and conceivably the most consequential legal obligation that states have in relation to migration and asylum). Lastly, the EU is reviewed i.e. what the EU is, its unique immigration laws as well as the values on which it is built, values it aspires to promote internationally (human rights, democracy, rule of law)⁵⁸ This Chapter is crucial in answering the main research question because it gives insight into the dominant factors that influence and shape the migration laws and policies of the EU and the member states, laws and policies generally considered hostile to foreigners. Secondly, the chapter is valuable in establishing whether the migrants moving into the EU through the Africa-EU migration have a right to asylum as well as protection under the non-refoulement principle. This is vital when interrogating the compatibility of the EAM with international law in Chapter 5. A review of the EU immigration laws and rules is relevant for determining the legal entity liable for international law violations during the management of the Africa-EU migration i.e. whether the EU, member states or both are liable. A review of the EU ideals is intended to set the backdrop for the evaluation of the EAM against international law mainly in Chapter 5. As a supranational entity that has assumed the mantle of a global champion of human rights, rule of law and democracy,⁵⁹ the standard to which the EU and member states should be held in relation to compliance with international human rights law and international law is justifiably very high, perhaps even higher than that set for other states and supranational entities.

2:1 MIGRATION AND STATE SOVEREIGNTY

⁵⁸ European Union, supra note 46; European Union op cit note 46

⁵⁹ Ibid

Migration is defined as a process in which individuals and groups of people leave their homes for various reasons.⁶⁰ The current mobility of people is higher than ever before in modern history and continues to increase sharply, becoming one of the determining global issues of 21st century.⁶¹ Worldwide regulation of migration is a 20th century invention.⁶² Although it was certainly the case that passports and border controls emerged at an earlier point in time,⁶³ it was not until the beginning of the 20th century that the world was fully and firmly divided by borders, and the requirement of passports and visas to cross them.⁶⁴

International law has traditionally defined migration control as an expression of state sovereignty.⁶⁵ The Black's Law Dictionary defines sovereignty as supreme dominion, authority or rule.⁶⁶ It defines state sovereignty as the supreme political authority of an independent state.⁶⁷

State sovereignty emphasises national borders and allows the exclusion of aliens.⁶⁸ In the present era of globalisation, control over the movement of people has become the last bastion of sovereignty.⁶⁹ The prerogative of states in relation to migration was well stated by the Supreme Court of the United States of America (USA) in *Nishimura Ekiu v. United States*:

“...It's an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid

⁶⁰ IOM, *Migration in the world*, <http://www.iom.sk/en/about-migration/migration-in-the-world> (accessed 20/10/2017 15.31)

⁶¹ Ibid

⁶² Ibid

⁶³ This story is well documented in John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State*, 2000, Cambridge University Press, Cambridge

⁶⁴ Catherine Dauvergne, *Challenges to Sovereignty: Migration Laws for the 21st Century*, , New Issues in Refugee Research, Working Paper No. 92, <http://www.unhcr.org/3f2f69e74.pdf> (accessed 24/9/2017 11.26)

⁶⁵ Daniel Thyme, “Citizens” and “Foreigners” in EU Law, *Migration Law and its Cosmopolitan Outlook*, European Law Journal, Vol. 22, No. 3, May 2016, pp. 296–316, 2016 John Wiley & Sons Ltd, Oxford, Page 311, Para 3, <http://onlinelibrary.wiley.com.ezproxy.uct.ac.za/doi/10.1111/eulj.12164/epdf> (accessed 12/9/2017 21.32)

⁶⁶ Black's Law Dictionary, *Sovereignty*, 2004, 8th Edition, Thomson West, Minnesota, Page 1430

⁶⁷ Ibid page 1430

⁶⁸ David M. Turoff, *Illegal Aliens: Can Monetary Damages Be Recovered from Countries of Origin Under an Exception to the Foreign Sovereign Immunities Act?*, Brooklyn Journal of International Law, Volume 28, Issue 1, 2002, Page 192, Para 3

⁶⁹ Dauvergne op cit note 2 at 588 para 1

the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe...”⁷⁰

It's generally conceded as shown above that state sovereignty is the ultimate determinant of migration laws and policies of states. Nonetheless, the exercise of state sovereignty today in relation to migration is not absolute. Its exercise is fettered, though to a very limited extent by some factors, the most significant of which are discussed below:

2:1:1 HUMAN RIGHTS, INTERNATIONAL LAW, STATES' INTER-DEPENDENCE: FETTERS ON SOVEREIGNTY

Plender, Joppke, Hathaway, Chetail, Bauloz and Dauvergne agree that state sovereignty today in relation to migration is not absolute; conceivably, most significantly fettered by human rights,⁷¹ international law⁷² and inter-dependence amongst states.⁷³

Dauvergne acknowledges that state sovereignty in relation to migration is eroded by human rights, particularly the Refugee Convention. However, she emphasises the very limited extent of the erosion since entering the convention is a sovereign act in itself and as shown by Australia and Canada, states can blatantly violate their obligations under the convention without consequence.⁷⁴ The author firmly agrees

⁷⁰ 142 U.S. 651 (12 S.Ct. 336, 35 L.Ed. 1146), Legal Information Institute, Cornell Law School, <https://www.law.cornell.edu/supremecourt/text/142/651> (accessed 12/9/2017 21.58)

⁷¹ ...In modern times, the most significant limitation on a state's right to exclude aliens are.... the extant and nascent rules designed to protect human rights; Plender op cit note 3 page 62 para 1; Thyme op cit note 65 page 311 para 3

⁷² States are no longer free to determine at will the entry and residence of aliens; treaties and international law restrict the freedom of states to control immigration; Christian Joppke (Ed.) *Challenge to the nation state, Immigration in Western Europe and the United States*, Oxford University Press, Oxford page 139 para 2; The sole constraint on a state's power to exclude at its borders all who are not citizens is found in the Refugee Convention; Vincent Chetail & Celine Bauloz, *Research Handbook on International Law and Migration*, Edgar Elgar, Cheltenham, 2014, Page 80 para 1

⁷³ Rules are established to support the polity's functional inter-dependence; James C Hathaway, *The Rights of Refugees under International Law*, 2005, Cambridge University Press, Cambridge page 75 para 1; Extreme measures that would be required to achieve near closure of borders are unimaginable. This would do such irreparable harm to trade, tourism and other global flows as to be effectively impossible, Chetail & Bauloz op cit note 72 page 77 para 2; Plender op cit note 3 at 61 para 3

⁷⁴ Dauvergne op cit note 2 page 597

with Dauvergne's conclusion that state sovereignty despite its fetters remains paramount in relation to migration.

Generally, the people who irregularly immigrate to the EU using the Africa-EU irregular mass-migration do so with the intention of seeking asylum in the EU. This implies that the exercise of state sovereignty by the EU in restricting the admission of the asylum-seekers is fettered under international law. A discussion on international law governing asylum and the principle of non-refoulement is therefore paramount for the purposes of this thesis.

Below is the discussion on asylum:

2:1:1:1 ASYLUM

Asylum as per Krenz is the protection, which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it.⁷⁵ Asylum is an ancient institution of a predominantly humanitarian character.⁷⁶

a) RIGHT TO ASYLUM UNDER INTERNATIONAL TREATY LAW

Article 13(2) of the Universal Declaration of Human Rights (UDHR) proclaims that, "everyone has the right to leave any country, including his own."⁷⁷ While *strictu sensu* the UDHR is not a legally binding instrument, it has been declared to set forth "the inalienable and inviolable rights of all members of the human family and to constitute an obligation for the members of the international community."⁷⁸ Moreover, the Declaration has been said to be an authoritative expression of the customary international law of today in regard to human rights.⁷⁹ Article 12(2) of the International Covenant on Economic Social and Cultural Rights (ICESCR) stipulates that people shall be free to leave any country, including their own, "⁸⁰ a provision

⁷⁵ Frank E. Krenz, *The Refugee as a Subject of International Law*, *The International and Comparative Law Quarterly*, Vol. 15, No. 1 (Jan., 1966), pp.90-116, Cambridge University Press, page 91 <http://www.jstor.org/stable/757286> (accessed 19/10/17 3.39)

⁷⁶ Ibid

⁷⁷ UN General Assembly, *Universal Declaration of Human Rights, 1948*, Article 13(2),

⁷⁸ UN, Final Act of the International Conference on Human Rights (Proclamation of Teheran) 1968 page 4 para 2

⁷⁹ Roman Boed, *The State of the Right of Asylum in International Law*, 5 *Duke J. Comp. & Int'l L.* 1, 34 (1994) page 6 para 2

⁸⁰ UNGA, *International Covenant on Economic, Social and Cultural Rights*, 1966,

corroborated by Article 12 (2) of the International Covenant on Civil and Political Rights (ICCPR).”⁸¹

Article 14(1) of the UDHR proclaims the right of an individual "to seek and to enjoy in other countries asylum from persecution.”⁸² Professor Lauterpacht amongst others has criticised the language of Article 14(1) for giving the individual a right to seek asylum without specifying whose duty it is to give effect to that right.⁸³ The principal international instruments relating to the protection of refugees, the Refugee Convention and the 1967 Protocol also don't provide a right to be granted asylum.⁸⁴ Lastly, regional instruments also don't provide for an individual's right to asylum.⁸⁵

b) RIGHT TO ASYLUM UNDER CUSTOMARY INTERNATIONAL LAW

The existence of the right to asylum under customary international law has been argued by some. It wouldn't seem too rash to submit that the international community subscribes to the principle that political persecutees aren't to be returned to their country of origin.⁸⁶ Considering the fact that the “general principles of law recognised by civilised nations " constitute a material source of the law of nations, it's doubtful whether the ICJ would actually deny legal validity to this principle.⁸⁷ Once such a customary duty of States not to return political refugees is established, the logical consequence to this rule would be the recognition of the existence of an individual right to asylum.⁸⁸ Doctrinal support for this viewpoint is not lacking, and an increasing number of authors have seriously considered it.⁸⁹ Although a general state usage to grant asylum may now undoubtedly be established, a necessary element in the formation of a customary legal norm, i.e., the *opinio juris* on the part

⁸¹ UNGA, *International Covenant on Civil and Political Rights*, 1966,

⁸² UNGA *supra* note 77

⁸³ *Boed op cite note 79 page 9*

⁸⁴ *Ibid* page 11 para 2

⁸⁵ *Ibid* para 3

⁸⁶ *Ibid*

⁸⁷ *Ibid*

⁸⁸ *Ibid*

⁸⁹ *Ibid*

of states, appears as still lacking.⁹⁰ It would seem, therefore, that the realisation of an individual right to asylum is still to await some kind of formal legal recognition.⁹¹

The author finds it safe to conclude that generally states have a right, rather than a duty, to grant asylum, flowing from their sovereign right to control admission into their territory.

Below is the discussion on the principle of non-refoulement:

2:1:1:2 THE PRINCIPLE OF NON-REFOULEMENT

While there's no obligation under international law to grant asylum to refugees, states are bound by the Non-Refoulement principle encapsulated in Article 33 of the Refugee Convention.⁹² The principle is the cornerstone of refugee protection, ⁹³now generally considered to constitute customary international law.⁹⁴ A significant body of authorities argue that the principle is now *jus cogens*.⁹⁵ The EUAFR interpretes

⁹⁰ Krenz op cit note 75 page 104 para 2

⁹¹ Ibid page 115 para 4

⁹² "No contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to... territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" UNGA (Refugee Convention) supra note 5 Article 33

⁹³ EU Agency for Fundamental Rights (EUAFR) *Scope of the Principle of Non-refoulement in Contemporary Border Management: Evolving Areas of Law*, page 13 para 1
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwia0t6lj4vWAhVJJcAKHZO1ABoQFggtMAE&url=http%3A%2F%2Ffra.europa.eu%2Fsites%2Fdefault%2Ffiles%2Ffra_uploads%2Ffra-2016-scope-non-refoulement_en.pdf&usg=AFQjCNECUItw96GXhheKZru1y0uDuisUVw (accessed 4/9/2017 10.46)

⁹⁴ The Appellants contended with the support of the intervener, the UNHCR, that the principle of Non-Refoulement has become a rule of customary international law as well as a peremptory norm, and as such, has become part of the Common law of the Hong Kong SAR ; *C, KMF and BF v. Director of Immigration, Secretary for Security and the UNHCR*, Hong Kong Court of Final Appeal of the Hong Kong SAR, Para 11 http://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=86311&currpage=T (accessed 4/9/2017 14.14); Inter-American Court of Human Rights, *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrant*, OC-18/03, 17 September 2003, Concurring Opinion of Judge A.A. Cançado Trindade, Para. 217ff; Guy S. Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, International Journal of Refugee Law, 2011, Vol. 23, No. 3, Pages 443-457; UNHCR, *Convention Plus Issues Paper submitted by UNHCR on addressing Irregular Secondary Movements of Refugees and Asylum-seekers*, FORUM/CG/SM/03, 11th March 2004, Page 6, Para 22, <http://www.unhcr.org/afr/protection/convention/407110d03/issues-paper-submitted-unhcr-addressing-irregular-secondary-movements-refugees.html?query=convention> accessed 8/9/2017 at 7.17

⁹⁵ Cathryn Costello & Michelle Foster, *Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the test*, University of Oxford, <https://www.rsc.ox.ac.uk/publications/non-refoulement-as-custom-and-jus-cogens-putting-the-prohibition-to-the-test> accessed 23/9/2017 at 15.25; Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, International Journal of Refugee Law, Vol. 13, 2001, pp. 533-558, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777446 (accessed 23/9/2017 15.28)

Certain rules of international law have always been considered so fundamental to the working of the system of states that states may not opt out of them. The ILC accepted that the idea of jus cogens and incorporated it

non-refoulement under the Refugee Convention to encompass direct and indirect refoulement; the former being a ban on the return to a country where a person would be at risk of persecution or serious harm, the latter being the return to countries where individuals would be exposed to a risk of onward removal to such countries (indirect or onward refoulement).⁹⁶

Though the EUAFR asserts the principle of non-refoulement in the Refugee Convention not only covers recognised refugees but also asylum-seekers,⁹⁷ Boed argues that the Convention only protects those determined to be refugees under its provisions,⁹⁸ a position that the author associates with.

As per the VCLT⁹⁹ a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.¹⁰⁰ However, since the 1951 Refugee Convention preceded the 1969 VCLT, which legally commenced in 1980, the generally accepted law principle of non-retrospectivity of treaties applies.¹⁰¹ However, considering that the Treaty was drafted by the ILC,¹⁰² the rules of VCLT reflecting prior customary international law apply to treaties concluded before the entry into force of the VCLT.¹⁰³ *Pacta Sunt Servanda* is such a rule.¹⁰⁴ Under this principle, it's conceivable that states have a responsibility to provide safe haven and guarantee the rights of

into Article 53 of the VCLT; TW Bennet & J Strug, *Introduction to International Law*, 2013, Juta & Co. Ltd., Cape Town page 27 para 3

⁹⁶ ECtHR, *M.S.S. v. Belgium & Greece*, No. 30696/09, 21st January 2011 para 293; EUAFR op cit note 92 page 14 footnote 7

⁹⁷ EUAFR op cit note 93 page 14 para 1

⁹⁸ Boed op cite note 79 page 18 para 1

⁹⁹ United Nations, *Vienna Convention on the Law of Treaties*, 1969,

¹⁰⁰ Ibid Article 31(1)

¹⁰¹ Ibid Article 28

¹⁰² The ILC was established by the General Assembly, in 1947, to undertake the mandate of the Assembly, under UN, Charter of the United Nations, 1945 Article 13 (1) (a) to "initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification, <http://legal.un.org/ilc/> (accessed 8/9/2017 6.29)

¹⁰³ Care must be taken not to ascribe a blanket customary law application to all provisions of the VCLT, as it is not all provisions of the Convention that pre-existed under customary international law; Amos Enabulele & Bright Bazuaye, *Teachings on Basic Topics in International Public Law*, 2014, Ambik Press, Benin City, Pages 112-113, The ICJ in *Case Concerning Armed Activities in the Territory of the Congo, (New Application, 2002) DRC vs. Rwanda*) held that the rules contained in Article 66 of the VCLT are not of customary law nature, ICJ Reports of Judgements, Advisory Opinions and Orders, 3rd February 2006, Page 52, Para 125, <http://www.icj-cij.org/files/case-related/126/126-20060203-JUD-01-00-EN.pdf> accessed 7/9/2017 at 12.46

¹⁰⁴ Catherine Phuong, *Identifying States' Responsibilities towards Refugees and Asylum Seekers*, page 2 footnote 15, <http://www.esil-sedi.eu/sites/default/files/Phuong.PDF> (accessed 31/10/17 11:17)

refugees in their territories since this is the underlying purpose of the Refugee Convention.

In addition, international human rights law has made non-refoulement an integral component of the prohibition of torture and cruel, inhuman or degrading treatment or punishment, enshrined in Article 7 of the ICCPR¹⁰⁵ and Article 3 of the Convention against Torture. (CAT)¹⁰⁶ According to the Human Rights Committee,

“States Parties must not expose individuals to the danger of torture or cruel or inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”.¹⁰⁷

Boed argues that while the Refugee Convention only protects those determined to be refugees under its provisions, the other international law treaties extend protection against refoulement to any person who would be in danger of being subjected to torture.¹⁰⁸

All EU Member States are party to these UN conventions.¹⁰⁹ The principle is conceivably entrenched in EU law. The Treaty on the Functioning of the EU (TFEU) stresses the need to comply with the principle of non-refoulement and so does the Court of Justice of the EU (CJEU). Article 18 of the EU Charter on Fundamental Rights¹¹⁰ enshrines the right to asylum with due respect to the rules of the 1951 Refugee Convention, thus including the refoulement prohibition in Article 33 of the convention. The ECtHR has interpreted Article 3 of the ECHR to encompass non-refoulement.

Below is the discussion on the EU examining its immigration law and policy and the human rights values the EU asserts to be based upon.

¹⁰⁵ UNGA (ICCPR) supra note 81

¹⁰⁶ UN, General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (CAT) 1984

¹⁰⁷ UN, Human Rights Committee, 1992, *General Comment No. 20: Article 7 (CAT)* 10th March 1992, EUFRA op cit note 92 page 45

¹⁰⁸ Boed op cite note 79 page 18 para 1

¹⁰⁹ EUAFR op cit note 93 page 13 para 8

¹¹⁰ European Union, *Charter of Fundamental Rights of the European Union*, 2012

2:2 THE EUROPEAN UNION (EU)

The EU is a unique economic and political union between 28 European countries that together cover much of the European continent. What began as a purely economic union has evolved into an organisation spanning policy areas, from climate, environment and health to external relations and security, justice and migration. A name change from the European Economic Community (EEC) to the European Union (EU) in 1993 reflected this.¹¹¹ The EU ranks as the world's second-largest economy by GDP.¹¹² By nominal GDP, the EU is nearly the same size as the USA and 63% larger than China.¹¹³

a) EU IMMIGRATION LAW AND RULES

Migration into the EU is regulated by a combination of EU law, national law, the ECHR, the European Social Charter, and international treaties entered into by EU states.¹¹⁴

The EU and its Member States share competence in the area of immigration.¹¹⁵ There are certain common immigration rules valid across the EU, while other aspects are determined by each EU state hence a variation in immigration rules amongst EU states.¹¹⁶ Since 1999, the EU has been developing a common immigration policy for Europe.¹¹⁷ EU states have agreed that the EU should have common immigration and visa rules valid across the EU, an agreement inked in the *Treaty on the Functioning of the European Union*. (2009)¹¹⁸ Common measures to date include; EU-wide rules that allow citizens of third countries to work or study in an EU state as well as EU-

¹¹¹ European Union, *The EU in Brief*, https://europa.eu/european-union/about-eu/eu-in-brief_en accessed 12/9/2017 at 12.14

¹¹² Abby Budiman & Dorothy Manevich, *Few see EU as World's top Economic Power despite its relative might*, 9th August 2017, Pew Research Center, <http://www.pewresearch.org/fact-tank/2017/08/09/few-see-eu-as-worlds-top-economic-power-despite-its-relative-might/> accessed 24/9/2017 at 9.14

¹¹³ Andrew Moravcsik, *Europe Is Still a Superpower*, Foreign Policy Magazine, <http://foreignpolicy.com/2017/04/13/europe-is-still-a-superpower/> accessed 24/9/2017 at 9.16

¹¹⁴ Catherine Tinker, *Saving Lives and Building Society: The European Migration Agenda*, 22 ILSA J. Int'l & Comp.

L. 393, 414 (2016), Page 397, Para 1

<http://heinonline.org.ezproxy.uct.ac.za/HOL/LuceneSearch?terms=tinker+european+agenda+on+migration&collection=all&searchtype=advanced&typea=text&tabfrom=&submit=Go&all=true> (accessed 24/9/2017 14.41)

¹¹⁵ European Commission, *Immigration Rules in the EU, Who does what?*, http://ec.europa.eu/immigration/who-does-what/more-information/explaining-the-rules-why-are-there-eu-rules-and-national-rules_en (accessed 12/9/2017 12.28)

¹¹⁶ Ibid

¹¹⁷ Ibid

¹¹⁸ Ibid

wide rules that allow citizens of third countries staying legally in an EU state to bring their non-EU family members to live with them and become long-term residents.¹¹⁹

EU-wide immigration rules generally apply in 25 out of the EU's 28 countries. Denmark doesn't apply EU-wide rules on immigration, visa and asylum.¹²⁰ Ireland and the UK choose, on a case-by-case basis, whether to adopt the EU wide rules.¹²¹ Each EU state decides independently the following; the number of migrants to admit for work, all final decisions on migrant applications, rules on long-term visas and stays longer than 3 months and conditions for obtaining residence and work permits when no EU-wide rules have been adopted.¹²²

Notably, the EU through the European Border and Coast Guard (EBCG) manages the EU external border primarily motivated by the desire to maintain the functioning of the Schengen Area.¹²³ EU member states nonetheless maintain competence and sovereignty over their respective borders.¹²⁴ It's envisaged that the EBCG will provide support for border control to all Member States when required.¹²⁵

b) THE EU, HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW

According to the EU itself, the EU is based on a strong commitment to promoting and protecting human rights, democracy and the rule of law worldwide.¹²⁶ Human rights are at the very heart of EU relations with other countries and regions.¹²⁷ The EU policy includes: working to promote the rights of women, children, minorities and displaced persons, opposing the death penalty, torture, human trafficking and discrimination, defending civil, political, economic, social and cultural rights, defending the universal and indivisible nature of human rights.¹²⁸ The EU also

¹¹⁹ European Commission op cit note 115

¹²⁰ Ibid

¹²¹ Ibid

¹²² Ibid

¹²³ European Commission, *European Border and Coast Guard agreed*, http://europa.eu/rapid/press-release_IP-16-2292_en.htm (accessed 12/9/2017 12.35)

¹²⁴ Ibid

¹²⁵ Ibid

¹²⁶ European Union, *Human Rights*, https://europa.eu/european-union/topics/human-rights_en (accessed 24/9/2017 9.53)

¹²⁷ Ibid

¹²⁸ Ibid

pursues human rights dialogues with over 40 states and organisations, including Russia, China and the African Union.¹²⁹

CHAPTER CONCLUSION

The Chapter examined the relationship encompassing migration, state sovereignty, asylum and the principle of non-refoulement. It was acknowledged that state sovereignty is the most fundamental factor in the forging of migration laws and rules of states though to a very limited extent, state sovereignty is today impinged most significantly by human rights, international law and the inter-dependence of states. The legal analysis done showed that under international law, states have a right rather than duty to grant asylum. The analysis also revealed that the principle of non-refoulement (generally considered to constitute customary international law) is conceivably the most consequential legally binding obligation that states have in relation to migration and asylum. A review of the EU immigration laws and rules revealed that the EU and member states generally share competence in the area of migration. Legal liability for breach of international law can hence arise for either entity depending on whether the breach falls under an area where the EU has competence or one in which a member state has competence. Liability may accrue both if competence is shared. Lastly, a review of the EU's values (human rights, rule of law and democracy) show that these values were pivotal in the establishment of the EU and remain central in the Union's operation. Additionally, these values underline the foreign policy and international relations of the EU. Therefore, the standard to which the EU itself should be held in relation to the respect, protection and fulfillment of these values is justifiably high.

The next chapter explores the fundamental terminologies in the field of migration while interrogating the inherent deficiencies in the Refugee Convention that severely limit its suitability as the centrepiece of international refugee protection today.

¹²⁹ European Commission op cit note 115

CHAPTER 3: FUNDAMENTAL MIGRATION TERMINOLOGIES AND THE INHERENT DEFICIENCIES IN THE REFUGEE CONVENTION

INTRODUCTION

This chapter defines the major terminologies in the field of migration while scrutinising the Refugee Convention, revealing its inherent deficiencies, which severely limit its applicability as the centrepiece of international refugee protection in today's world.¹³⁰ Moreover, these deficiencies also contribute to the currently broken international refugee protection system¹³¹ and consequently the current global refugee crisis¹³² of which the Africa-EU irregular mass-migration is part. The chapter commences by making the case for the relevance of the use of appropriate terminology in the migration discourse. Migrants, illegal migrations, "illegal" migrants, irregular migrations, refugees and asylum-seekers are then defined. The analysis of the Refugee Convention is done while defining refugees. This Chapter is imperative in answering the main research question because it's essential for establishing the category of migrants under which the persons involved in the Africa-EU migration fall as per international law. Recalling that international law offers different protections for different categories of migrants, the relevance of this categorisation cannot be overstressed particularly when analysing the compliance of the EAM with international law in Chapter 5. Secondly, by arguing that the Refugee Convention has inherent deficiencies that severely limit its relevance for the asylum and refugee situation today, the Chapter tackles a matter at the heart of the main research question i.e. why the international refugee system is broken. An interrogation of this question is vital if one is to gain an understanding of why currently there's a global refugee "crisis" whose spill over effect is the EU migration "crisis".

3:1 WHY APPROPRIATE TERMINOLOGY IN MIGRATION DISCOURSE?

The choice of correct terminology is crucial as often language contributes to shaping the reality which national authorities present to their populations and the

¹³⁰ UNGA (Refugee Convention) supra note 5

¹³¹ The world's system for protecting refugees is broken. It is obvious from Australia to South Sudan's vast camps, from Istanbul's cold streets to the EU's heavily fortified walls, Amnesty International, *8 Ways to solve the World Refugee Crisis*, <https://www.amnesty.org/en/latest/campaigns/2015/10/eight-solutions-world-refugee-crisis/> (accessed 1/1/17 23.22)

¹³² UNHCR op cit note 30

world.¹³³ According to the UN Special Rapporteur on the Human Rights of Migrants,¹³⁴

Using incorrect terminology that negatively depicts individuals as “illegal” contributes to the negative discourses on migration, and further reinforces negative stereotypes of irregular migrants as criminals. Moreover, such language legitimates the discourse on criminalisation of migration, which in turn, contributes to the further alienation, discrimination and marginalisation of irregular migrants, and may even encourage verbal and physical violence against them.¹³⁵

Below are definitions of some of the fundamental terminologies in the international migration discourse through a majorly international law perspective;

3:1:1 MIGRANTS

The International Organisation for Migration (IOM) defines a migrant as any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person’s legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.¹³⁶ Usually the terms “migrants” and “aliens” are used synonymously, although there’s a slight difference.¹³⁷ An alien is an individual who is not a national of the State in which he or she is present.¹³⁸

Intertwined with the definition of a migrant is the issue of illegal migrants and irregular migration discussed below;

3:1:2 ILLEGAL MIGRATIONS

¹³³ OHCHR, *Stakeholders Consultation on Remedies and Procedures on the Right to Challenge the Lawfulness of Detention before Court*, Platform for International Cooperation on Undocumented Migrants (PICUM) page 5 <http://www.ohchr.org/Documents/Issues/Detention/Consultation2014/PICUM.pdf> accessed 14/4/2017 at 20.56

¹³⁴ Ibid page 6

¹³⁵ Ibid

¹³⁶ IOM, *Who is a migrant?*, <https://www.iom.int/who-is-a-migrant> (accessed 13/4/2017 22.07)

¹³⁷ Yannis Ktistakis, *Protecting Migrants under The European Convention on Human Rights and the European Social Charter, A Handbook for Legal Practitioners*, Council of Europe page 9, http://www.coe.int/t/democracy/migration/Source/migration/ProtectingMigrantsECHR_ESCWeb.pdf accessed 14/4/2017 at 17.34

¹³⁸ UNGA, *Declaration on the human rights of individuals who are not nationals of the country in which they live*, Article , 1985, <http://www.un.org/documents/ga/res/40/a40r144.htm> (accessed 14/4/2017 17.37)

According to Samers, illegal immigration is an epiphenomenon of migration and citizenship policy or as many observers argue, illegal immigration is produced.¹³⁹ There can be no illegal immigration without immigration policy.¹⁴⁰ The definition of those deemed “illegal”, “irregular”, or “undocumented” shifts with the nature of immigration policy; there are those who “overstay”, those who have “lost” their documents, those who falsify documents, those that enter clandestinely, rejected asylum-seekers, and more generally, the socio-legal “grey area” between illegal status and asylum-seeking status.¹⁴¹

In the migrant advocacy community, there’s great opposition to calling people “illegals” or even “illegal migrants”.¹⁴² It’s argued to be an affront on human dignity to reduce one’s entire being to a single transgression.¹⁴³ Indeed, until the later part of the 20th century, breaching immigration rules and regulations was not even considered truly criminal but was generally instead understood as an administrative infraction.¹⁴⁴ The extraordinary transformation of the migration discourse in the last two or three decades is that people have been made “illegal”.¹⁴⁵

3:1:3 IRREGULAR MIGRATIONS

The ECA cites the IOM while noting that there’s no universally accepted definition of what constitutes irregular migrations. From the perspective of destination countries, its entry, stay or work in a country without the necessary authorisation or documents required under the immigration regulations.¹⁴⁶

3:1:2 REFUGEES

¹³⁹ Michael Samers, *An Emerging Geopolitics of ‘Illegal’ Immigration in the European Union*, *European Journal of Migration and Law* 6: 27–45, 2004 page 2, Koninklijke Brill NV, Netherlands

¹⁴⁰ Ibid

¹⁴¹ Ibid

¹⁴² Chetail & Bauloz op cite note 72 page 76 para 1

¹⁴³ Ibid para 2

¹⁴⁴ Chetail & Bauloz op cite note 72 page 76 para 2

¹⁴⁵ Ibid

¹⁴⁶ European Court of Auditors (ECA) *EU response to the Refugee crisis: the ‘Hotspot’ Approach*, No.6, 2017, Page 8, Footnote 1, http://www.eca.europa.eu/Lists/ECADocuments/SR17_6/SR_MIGRATION_HOTSPOTS_EN.pdf accessed 16/8/2017 at 15.17

The Refugee Convention is today “one of the most widely accepted international norms, and remains the sole legally binding international instrument that provides protection to refugees.”¹⁴⁷

In defining a refugee, The Refugee Convention first qualifies persons who were considered refugees by international instruments and international organisations that preceded the Refugee Convention itself and the UNHCR.¹⁴⁸ The Refugee Convention then extends the definition of a refugee to capture persons who owing to events occurring before 1951 (European refugees in the aftermath of World War II)¹⁴⁹ and owing to well-founded fear of being persecuted on grounds of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁵⁰

Despite subsequent agreements that have moved towards universalising the Refugee definition under the Refugee Convention, the Convention’s diction today remains the litmus test for identifying “real” refugees.¹⁵¹ Because many people don’t fit into the Convention’s definition of a refugee, they cannot be classified as such.¹⁵² Therefore, no state is necessarily responsible for their asylum.¹⁵³ The Refugee Convention definition is increasingly irrelevant to the majority of refugees, who face violence on a broader scale and for different reasons than those of post-war Europe.¹⁵⁴ If individuals apply for asylum and aren’t granted refugee status as a result of not

¹⁴⁷ Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, International Journal of Refugee Law, 14 (2/3): 238-262, Page 246

¹⁴⁸ UNGA supra note 5 Article 1, A (1)

¹⁴⁹ UNHCR, *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, page 1 para 2

¹⁵⁰ UNGA supra note 5 Article 1, A(2)

¹⁵¹ Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism*, 2010, University of Minnesota Press, London, Page 11, <https://www.sussex.ac.uk/webteam/gateway/file.php?name=mwp28.pdf&site=252> accessed 11/9/2017 at 12.30

¹⁵² Ibid

¹⁵³ Ibid

¹⁵⁴ Ibid

fitting into this Convention definition they're likely to be labelled "bogus asylum seekers", illegal immigrants attempting to cheat the system.¹⁵⁵

Below is an analysis of the inherent deficiencies in the Refugee Convention:

3:1:2:1 INHERENT DEFICIENCIES IN THE 1951 REFUGEE CONVENTION

The inherent deficiencies under The Refugee Convention are numerous. This paper limits itself to some salient ones of relevance to the thesis i.e. eurocentricism, racism, individualism, parochialism and androcentricism.

a) EUROCENTRIC AND RACIST

The current refugee regime is the product of hegemonic Western epistemologies, and its existence and the continued privileging of Western conceptions of human rights, democracy, and freedom are co-dependent.¹⁵⁶ The prescribed grounds for persecution were closely linked to the Eurocentric conception and concern for the denial of civil and political rights but not for the denial of economic, social and cultural rights advocated for by the Communist and developing states.¹⁵⁷ The "myth of difference" at the time of its drafting presented non-European refugees as radically different from European ones, excluding the former from the Convention.¹⁵⁸ The Convention's definition of a refugee was never intended to be universal.¹⁵⁹ Refugees existed outside Europe in 1951 (for example in China, Korea and Palestine) but their plight and of their host countries were not considered by the Convention;¹⁶⁰ According to Rafiqul Islam, the articulation of refugee status under the Refugee Convention was meant to exclude particular problems and displaced people from the purview of the West and limit their responsibility.¹⁶¹ B.S. Chimni acknowledges a

¹⁵⁵ Lucy Mayblin, *Historically European, Universally Moral?* The 1951 Geneva Convention on the Status of Refugees. e-International Relations (online journal)
https://www.google.com/search?q=historically+european+morally+universal+lucy+mayblin+pdf&ie=utf-8&oe=utf-8&client=firefox-b&gfe_rd=cr&dc=0&ei=Hlf4WYvjIOeo8we5g5HABQ# (accessed 31/10/2017 13.01)

¹⁵⁶ Mayblin op cite note 155

¹⁵⁷ Islam & Bhuiyan(eds) op cite note 7 page 23 para 2

¹⁵⁸ B.S Chimni, *"The Geopolitics of Refugee Studies: A View from the South."* Journal of Refugee Studies 11(4): 350–374. Page 351

¹⁵⁹ Hyndman op cite note 151

¹⁶⁰ Mayblin op cite note 151

¹⁶¹ Islam & Bhuiyan(eds) op cite note 7 page 23

“traditional” figure of the “normal” refugee created, was one who was “white, male and anti-communist.”¹⁶²

b) INDIVIDUALISTIC, PAROCHIAL, ANDRO-CENTRIC

Persecution in the Convention is limited to the individual as a victim. It doesn't offer protection to masses of people fleeing persecution.¹⁶³ This is unsuitable for the reality of many displacement situations today.¹⁶⁴

The Convention doesn't actually define “persecution”.¹⁶⁵ As per Wilsher,¹⁶⁶

*“...It may seem astonishing that even 50 years and thousands of judicial decisions after its signature, the Refugee Convention continues to produce novel interpretations of central concepts such as the meaning of persecution and protection ...”*¹⁶⁷

When The Refugee Convention was negotiated, the agents of persecution were as a rule, states. The drafters recognised refugees to be fleeing oppressive, totalitarian and particularly Communist governments. The agents of “persecution” are no longer necessarily state actors, but non-state actors, or even sub-state actors, rebels and militias.¹⁶⁸

The Refugee Convention is andro-centric. The word woman or gender is not mentioned.¹⁶⁹

Scholars like Andrew Shacknove¹⁷⁰ and Michael Dummett¹⁷¹ argue for a rethinking of the definition of a refugee based upon humanitarian principles in the broadest sense to replace the narrow confines of The Refugee Convention. However, most commentators agree that it's unlikely that the 1951 definition of a refugee would be opened up to re-negotiation. Certainly a new Convention or Protocol is unlikely to

¹⁶² Chimni op cit note 8 at 351

¹⁶³ McFadyen op cit note 6 page 14 para 2

¹⁶⁴ Mayblin op cit note 155

¹⁶⁵ McFadyen op cit note 6 page 14 para 2

¹⁶⁶ Daniel Wilsher, *Non-State Actors and the Definition of a Refugee in the UK: Protection, Accountability or Culpability?* International Journal of Refugee Law, 2003, 15(1) 68-112, Page 106

¹⁶⁷ Ibid

¹⁶⁸ Ibid pages 14-15

¹⁶⁹ Asha Hans, *Gender, Camps and International Norms*, Mahanirban Calcutta Research Group Library, Page 69, http://www.mcrg.ac.in/rw%20files/rw32/3.asha_hans.pdf accessed 11/9/2017 at 14.40

¹⁷⁰ Andrew Shacknove, *Who is a Refugee?* Ethics 95(2), 274-284, Page 277

¹⁷¹ Edie Friedman & Reva Klien, *Reluctant Refugee: The Story of Asylum in Britain*, 2008, The British Library, London, Page 8

receive the near universal ratification currently enjoyed if it included a more generous or more inclusive definition of a refugee.¹⁷²

Perhaps the most crucial development formulated to overcome the defective Refugee Convention internationally was the 1967 Protocol:

d) THE 1967 PROTOCOL TO THE 1951 REFUGEE CONVENTION

The African events pertaining to decolonisation in the 1960s particularly exposed the insurmountable difficulties posed by The Refugee Convention in protecting African refugees.¹⁷³ This placed the modification of the Convention in the international spotlight hence the adoption of *The Protocol Relating to the Status of Refugees* 1967.¹⁷⁴ The Protocol “universalised” the refugee definition. It highlights (though very diplomatically) that the Refugee Convention covered only European refugees who became refugees owing to events occurring before 1st January 1951.¹⁷⁵ It further states that new refugee situations have arisen after the operationalisation of the Refugee Convention and since these refugees aren’t captured in the Convention definition, there’s a need for all refugees to enjoy equal status.¹⁷⁶ The Protocol goes ahead to modify with an exception, the provisions of Articles 1 and 1A(2) of the Refugee Convention by omitting the words, “*As a result of events occurring before 1 January 1951*” and “*As a result of such events*” found in Articles 1 and 1A(2) respectively.¹⁷⁷ Lastly, the Protocol strives to remove any geographical limitations as to who can be a refugee.¹⁷⁸

It’s worth noting that despite the formulation of the Protocol, it only modifies the Refugee Convention in relation to the geographic scope (Article 1). The rest of the Convention is left intact, conceivably poisoned with the racist, patriarchal and parochial spirit that informed the geographic limitations.

¹⁷² Thomas G. Weiss & Rorden Wilkinson, *International Organisation and Global Governance*, Routledge, London, 2014, Page 672

¹⁷³ Islam & Bhuiyan, (eds) op cit note 6 pages 23-24

¹⁷⁴ Islam & Bhuiyan, (eds) op cit note 6 pages 23-24

¹⁷⁵ UNGA, *Protocol Relating to the Status of Refugees*, 1967, Preamble

¹⁷⁶ Ibid

¹⁷⁷ UNGA supra note 175, Article 1(2)

¹⁷⁸ Ibid Article 1(3)

3:1:3 ASYLUM-SEEKERS

The IOM defines an Asylum-Seeker as

A person who seeks safety from persecution or serious harm in a country other than his or her own and awaits a decision on the application for refugee status under relevant international and national instruments. In case of a negative decision, the person must leave the country and may be expelled, as may any non-national in an irregular or unlawful situation, unless permission to stay is provided on humanitarian or other related grounds.¹⁷⁹

The UNHCR further elaborates that an asylum-seeker is someone whose request for sanctuary has yet to be processed.¹⁸⁰

CHAPTER CONCLUSION

The Chapter made a case for the importance of the use of appropriate terminology in the migration discourse. Key migration terminology; migrants, illegal migrations, illegal migrants, refugees and asylum-seekers were defined. In the course of defining refugees, a critique of the Refugee Convention was done, exposing its inherent deficiencies and incapacity as the premier international legal instrument for the asylum and refugee dynamics and situation today. Lastly, the case made by some scholars for the re-thinking of the definition of a refugee was made while recognising the attempt by the 1967 Protocol to expand definition of a refugee.

The next chapter explores the nitty-gritty of the Africa-EU irregular mass-migration with a particular focus on the major irregular migration routes from Africa to the EU.

¹⁷⁹ IOM, *Asylum Seeker*, <https://www.iom.int/key-migration-terms> accessed 7/6/2017 at 10.18

¹⁸⁰ UNHCR, *Asylum Seekers*, <http://www.unhcr.org/asylum-seekers.html> accessed 7/6/2017 at 10.20

CHAPTER 4: THE AFRICA-EU IRREGULAR MASS-MIGRATION

INTRODUCTION

This Chapter brings into focus the Africa-EU irregular mass migration. First, the push and pull factors of the migration as well as its *modus operandi* are highlighted. The generally recognised irregular migration routes emanating from Africa that collectively feed the migration are then examined i.e. the Western Mediterranean, Central Mediterranean and West African Routes while revealing the crucial role of Libya in the Central Mediterranean route. An understanding of the push and pull factors is critical for the research question because these factors are fundamental in determining the categories of migrants involved in the migration under international law. This determination is needed in order to invoke the applicable international law and also resolve whether the EU and member states are complying with international law while receiving and handling the respective migrants. A review of the migration routes is also vital for the main research question. Firstly, it reveals that indeed there is an Africa-EU irregular mass-migration while disclosing the African and non-African states from which the migrants emanate. Secondly, the routes are the “highways” that have enabled the EU migration “crisis” especially following the closure of all the other non-African routes (Eastern Mediterranean and West Balkans routes) that initially facilitated the migration “crisis.”¹⁸¹ Thirdly, the routes divulge the reality that the Africa-EU migration is essentially a “mixed” migration. Lastly, as shown in Chapter 5, the closure of the migration routes plausibly forms the backbone of the EU plan for ending the migration “crisis”. The EU’s zeal for closing the routes has played a major role in the serious affronts against international law by the EU and member states, also analysed in Chapter 5.

Below are the push and pull factors of the Africa-EU irregular mass migration;

4:1 PUSH AND PULL FACTORS

The conventional wisdom underlying the Africa-EU migration discourse is that war and poverty are the root causes of mass migration across and from Africa.¹⁸² According to the EU, the migrations are to escape from political oppression,

¹⁸¹ European Commission op cit note 37 page 1

¹⁸² Haas op cit note 11 page 1305 para 2

war and poverty, as well as to find family reunification, entrepreneurship, knowledge and education.¹⁸³

Below is an exploration of the dynamics of the Africa-EU migration on ground;

4:2 MODUS OPERANDI

The common portrayal of irregular African migrants as “desperate” and impoverished victims of “unscrupulous” traffickers and “merciless” criminal run smuggling networks is inconsistent with empirical evidence which suggests that the vast majority of migrants move on their own initiative, perceive the migration fees as an investment and most are relatively well-off.¹⁸⁴ The Guardian reports that Africans trying to cross the Mediterranean can pay up to \$1,000 and Syrians up to \$2,500.¹⁸⁵ Although the vast majority of the people that irregularly migrate into Europe from Africa are nationals of states in North, West, Central and East Africa, other notable migrants come from as far as Bangladesh¹⁸⁶ and Syria.¹⁸⁷

The Africa-EU irregular mass-migration is generally characterised by “mixed migration flows.”¹⁸⁸ The IOM defines these flows as “complex population movements including; refugees, asylum-seekers, economic migrants and other migrants’.¹⁸⁹ Unaccompanied minors, environmental migrants, smuggled persons, victims of trafficking and stranded migrants, among others, may also form part of a mixed flow.”¹⁹⁰

¹⁸³ The European Commission op cit note 1 page 2 para 1, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf accessed 11/8/2017 at 18.10

¹⁸⁴ Patrick Kingsley, *Libya's people smugglers: inside the trade that sells refugees hopes of a better life*, 24th April, 2014, The Guardian Newspaper, London, <https://www.theguardian.com/world/2015/apr/24/libyas-people-smugglers-how-will-they-catch-us-theyll-soon-move-on> (accessed 10/9/2017 6.38)

¹⁸⁵ Ibid

¹⁸⁶ European Commission supra note 21 page 4 para 1

¹⁸⁷ Liska Wittenberg, *Managing Mixed Migration: The Central Mediterranean Route to Europe*, Desperate Migration Series, No.3, International Peace Institute page 11 para 5 https://www.ipinst.org/wp-content/uploads/2017/04/1704_Managing-Mixed-Migration.pdf (accessed 16/6/2017 23.07)

¹⁸⁸ Altaï Consulting, *Mixed Migration: Libya at the Crossroads*, 2017 <https://www.altaiconsulting.com/insights/mixed-migration-libya-at-the-crossroads/> accessed 25/9/2017 at 9.52

¹⁸⁹ IOM, *what is Mixed Migration?* Page 1, Para 1 <https://www.iom.int/files/live/sites/iom/files/Country/docs/Mixed-Migration-HOA.pdf> accessed 25/9/2017 at 9.54

¹⁹⁰ Ibid

People smugglers generally typically put migrants aboard old, unseaworthy fishing boats and of recent on small rubber dinghies.¹⁹¹ These vessels are overloaded and prone to capsizing.¹⁹² These vessels are generally equipped with poor engines, lack proper navigation systems and often have insufficient fuel to reach Europe.¹⁹³ The vast majority of border control operations hence turn into Search and Rescue (SAR) operations.¹⁹⁴

Below, the routes that facilitate the migration are explored;

4:3 AFRICA-EU MIGRATION ROUTES

According to FRONTEX, there are 3 routes to the EU used by irregular African migrants; The Western Mediterranean Route, the Central Mediterranean Route and the West African Route.¹⁹⁵

4:3:1 THE WESTERN MEDITERRANEAN ROUTE

The Western Mediterranean route generally refers to the route from North Africa to Spain.¹⁹⁶ A decade ago, migrants from Morocco to Spain were typically economic ones from Algeria and Morocco, hoping for jobs in Spain, France and Italy.¹⁹⁷ Since then, however, they have increasingly been joined by sub-Saharan Africans, driven northwards by conflicts in Mali, Sudan, South Sudan, Cameroon, Nigeria, Chad and the Central African Republic. (CAR)¹⁹⁸ In 2015, Syrians accounted for the biggest share of detections on this route.¹⁹⁹

The Morocco- Spain route had been a noted pressure point for years since 2005.²⁰⁰ Co-operation between Spain and Morocco has since kept migrant numbers

¹⁹¹ *Central Mediterranean Route*, FRONTEX, <http://frontex.europa.eu/trends-and-routes/central-mediterranean-route/> accessed 12/6/2017 at 12.43

¹⁹² Ibid

¹⁹³ Ibid

¹⁹⁴ Ibid

¹⁹⁵ FRONTEX, *Migratory Routes Map*, <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/> accessed 12/6/2017 at 12.05

¹⁹⁶ IOM & Altai Consulting *Migration Trends Across the Mediterranean: Connecting the Dots*, Page 19 https://publications.iom.int/system/files/altai_migration_trends_accross_the_mediterranean.pdf accessed 19/6/2017 at 21.00

¹⁹⁷ FRONTEX, *Western Mediterranean Route*, <http://frontex.europa.eu/trends-and-routes/western-mediterranean-route/> accessed 12/6/2017 at 12.06

¹⁹⁸ Ibid

¹⁹⁹ Ibid

²⁰⁰ Ibid

comparatively low on this route.²⁰¹ Additionally, Spain has step up coastal patrols, installed the SIVE maritime surveillance system along its southern border and signed bi-lateral agreements with Mauritania and Senegal while strengthening border checks at the main ports.²⁰² Rising unemployment in Spain and fewer opportunities for migrant workers is also thought to be a factor.²⁰³

According to FRONTEX, the following are the statistics of the irregular border crossings on the Western Mediterranean route from 2008-2016; 2008-6500, 2009-6650, 2010-5000, 2011-8450, 2012-6400, 2013-6800, 2014-7840, 2015-7164, 2016-10231.²⁰⁴

4:3:2 CENTRAL MEDITERRANEAN ROUTE

The Central Mediterranean route refers to the mixed migratory flow coming from Northern Africa to Italy and Malta.²⁰⁵ (The paper focuses on Italy since the country is the most attractive destination for irregular migrants who want to move to Western Europe)²⁰⁶ Libya has traditionally been a major transit point for Sub-Saharan and West African migrants along this route and the main departure point for crossing the Mediterranean though Egypt is increasingly becoming a significant transit and departure point.²⁰⁷

Between 2011 and 2016, some 630,000 irregular migrants and refugees reached Italy via the Central Mediterranean.²⁰⁸ With the tightening of the Spanish borders,²⁰⁹ the closing of the Western Balkan route and the conclusion of the EU-Turkey agreement, the Central Mediterranean now acts as the main gate of entry for irregular migrants arriving in the EU by sea.²¹⁰

²⁰¹ FRONTEX op cit note 197

²⁰² Ibid

²⁰³ Ibid

²⁰⁴ Ibid

²⁰⁵ IOM & Altai Consulting op cit note 196 page 57

²⁰⁶ European Commission op cit note 37 page 8 para 2

²⁰⁷ Ibid

²⁰⁸ European Commission op cit note 37 page 1

²⁰⁹ Wittenberg op cit note 187 page 8 para 2

²¹⁰ European Commission op cit note 37 page 1

The Central Mediterranean Route, on the one hand, originates in the Horn of Africa and runs via Sudan into Libya and to a much lesser extent into Egypt.²¹¹ Eritreans, Ethiopians, Somalis and Sudanese mainly travel this route.²¹² On the other hand, there are routes through Chad and Niger Northwards into Libya, used principally by West Africans.²¹³ A trend on this route concerns the secondary movements of asylum-seekers from Syria and from North African countries of first refuge to Europe.²¹⁴

In 2016, over 181,000 irregular migrants were detected on the Central Mediterranean route, the vast majority of whom reached Italy. The country reported an 18% increase in arrivals compared to 2015, a number surpassing the previous peak of 2014.²¹⁵ According to FRONTEX, the following number of migrants were detected on this route: 2016-2008; 2016-181,126, 2015-153,946, 2014-170,760, 2013-40,000, 2012-15900, 2011-64300, 2010-4500, 2009-11,000, 2008-39,800²¹⁶

The pivotal role Libya plays in the Central Mediterranean route is discussed below;

LIBYA

Libya's geographic location makes it an ideal platform for refugees and migrants to depart across the Mediterranean to the EU.²¹⁷ Libya lies at the crossroads of the Central Mediterranean route and represents the departure point for almost 90% of those seeking to travel to Europe.²¹⁸ Smugglers and traffickers exploit an unstable Libya as the main country of departure (90%) was followed by Egypt (7%) then Algeria (0.6%) and Tunisia (0.5%).²¹⁹ The Central Mediterranean sea route via Libya has long been popular; in 2008, nearly 40,000 irregular African migrants were

²¹¹ IOM, *Addressing Complex Migration Flows in the Mediterranean*: IOM Response Plan, Page 11
https://www.humanitarianresponse.info/system/files/documents/files/addressing_complex_migration_flows_in_the_mediterranean_-_iom_response_plan.pdf

²¹² Ibid

²¹³ Ibid

²¹⁴ Ibid

²¹⁵ Ibid page 4 para 3

²¹⁶ FRONTEX, *Illegal border crossings on the Central Mediterranean route (including Apulia and Calabria) in numbers*, <http://frontex.europa.eu/trends-and-routes/central-mediterranean-route/> (accessed 16/6/2017 18.50)

²¹⁷ Wittenberg op cit note 187 page 8 para 3

²¹⁸ European Commission supra note 37 page 2 para 3

²¹⁹ Ibid page 3 para 5

detected.²²⁰ The migration almost completely stopped in 2009 following a bi-lateral agreement between Italy and Libya.²²¹ With the collapse of the Gadhaffi regime in 2011, by 2013, there was no shortage of people desperate to escape Libya as the state imploded and violence escalated.²²² In what is a *de facto* failed state, smugglers operate with impunity.²²³

4:3:3 WEST AFRICAN ROUTE

According to FRONTEX, the route between Senegal, Mauritania, Morocco and the Spanish Canary Islands was once the busiest irregular entry point for the whole of Europe, peaking at 32,000 migrants arriving on the islands in 2006.²²⁴ But the numbers dropped by 60% in 2007 following bi-lateral agreements (including repatriation agreements) between Spain, Senegal and Mauritania. Strengthened border controls also played a key role.²²⁵

Migrants on this route were mostly from Morocco and Senegal, with others from Niger, Nigeria and Mali.²²⁶ The numbers continued to drop from 2007, until by 2012 there were just 170 arrivals in the Canaries.²²⁷ The figure remained stable, rising to 874 in 2015.²²⁸

According to FRONTEX, the following number of migrants used this route; 2006-2016; 2006-31,600, 2007-12,500, 2008-9200, 2009-2250, 2010-200, 2011-340, 2012-170, 2013-250, 2014-275, 2015-874, 2016-671.²²⁹

CHAPTER CONCLUSION

The Chapter examined the Africa-EU irregular mass-migration. The push and pull factors of the migration were reviewed in addition to its general modus operandi. The generally recognised routes that facilitate the Africa-EU migration as well as other pertinent details relating to the routes were discussed. This was followed by a

²²⁰ FRONTEX op cit note 216

²²¹ FRONTEX op cit note 216

²²² Ibid

²²³ Ibid

²²⁴ FRONTEX, *West African Route*, <http://frontex.europa.eu/trends-and-routes/western-african-route/> (accessed 12/6/2017 12.49)

²²⁵ Ibid

²²⁶ Ibid

²²⁷ Ibid

²²⁸ Ibid

²²⁹ Ibid

revelation of the “mixed migration” nature of the Africa-EU migration. Lastly, it was confirmed that currently, the Africa-EU irregular migration is the principal enabler of the EU migration “crisis”, following the “closure” of the other non-African routes (the Eastern Mediterranean and West Balkans routes) that previously also facilitated the EU migration “crisis.”

The next chapter is the core of the thesis and answers the main research question of the thesis; Whether the European Agenda on Migration (Immediate Action) conforms to international law whilst seeking to curb the Africa-EU irregular mass-migration?

CHAPTER 5: THE EUROPEAN AGENDA ON MIGRATION AND ITS CONFORMITY WITH INTERNATIONAL LAW

INTRODUCTION

The Chapter commences by defining international law. The international law applicable to the EU and member states pertaining to internationally wrongful acts is ascertained. The Chapter then introduces the EAM and thereafter analyses the compliance of the Immediate Actions under the EAM with international law. The methodology of the analysis is as follows; each of the six immediate actions and their implementation plans under the EAM are stated. The execution of the plans on ground is then examined. Each of the immediate plans, their respective planned implementation and actual execution on ground are then analysed through an international law lens; where the EU or Italy or both are found to be plausibly liable under international law, a demonstration of how liability accrues them is done. A conclusion for the Chapter is then drawn.

INTERNATIONAL LAW

International law is generally taken to be a system of rules governing relations among states.²³⁰ States have been the typical subjects of international law.²³¹ A proliferation of international organisations of recent has seen the extension of legal capacity to them as well.²³² One of these is the EU, which has its own legal personality separate from that of member states.²³³

Below is an illustration of the liability under international law of the EU when acting alone and when its actions and omissions are intertwined with that of a member state(s). This illustration is important for the Chapter because despite the EAM being mainly implemented by the EU, some aspects are implemented jointly by the EU and member states particularly Italy in the analysis under this Chapter.

²³⁰ Bennet & Strug op cite note 95 page 1 para 1

²³¹ Ibid page 57 para 2

²³² Ibid

²³³ European Union(Lisbon Treaty) supra note 46, Article 47

5:2 LEGAL LIABILITY OF THE EU AND MEMBER STATES UNDER INTERNATIONAL LAW

The EU is an international organisation under international law. An international organisation is one established by a treaty or other instrument governed by international law, possessing its own international legal personality.²³⁴ However, some legal entities like the EU are not contemporary international organisations. Nonetheless, they are captured under the DARIO.²³⁵ Additionally, the Commentary on Article 48 in the DARIO by the ILC makes reference to the EU as an international organisation.²³⁶ The EU is therefore indisputably an international organisation.

Below are selected crucial international law provisions that govern the liability of the EU as an international organisation. These provisions are indispensable when establishing the legal liability of the EU in relation to the EAM and its implementation:

INTERNATIONAL LAW GOVERNING THE LEGALITY OF THE EU AND MEMBER STATES' ACTIONS AND OMISSIONS

An international organisation commits an internationally wrongful act when conduct consisting of an action or omission is attributable to that organisation under international law and the action or omission constitutes a breach of an international obligation of that organisation.²³⁷

The conduct of an organ or agent of an international organisation in the performance of the functions of that organ or agent shall be considered an act of the organisation under international law regardless of the organ or agent's position in respect of the organisation.²³⁸

The conduct of an organ or agent of an international organisation is considered an act of that organisation under international law if the organ or agent acts in an

²³⁴ ILC, *Draft Articles on the Responsibility of International Organisations (with commentaries)*(DARIO) Article 2(a)

²³⁵ Mirka Möldner, Responsibility of International Organisations-Introducing the ILC's DARIO, Page 289, Para 4 in A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 16, 2012, p. 281-328, Koninklijke Brill N.V. http://www.mpil.de/files/pdf4/mpunyb_06_Moeldner_161.pdf accessed 4/9/2017 at 21.47

²³⁶ ILC supra note 234 page 76

²³⁷ Ibid Article 4

²³⁸ Ibid Article 6

official capacity and within the overall functions of that organisation even where the conduct surpasses the authority of that organ or agent or contravenes instructions.²³⁹

An international organisation that aids or assists a state or another international organisation in the commission of an internationally wrongful act by the state or the latter organisation is internationally responsible for doing so if the former organisation does so with the knowledge of the internationally wrongful act and the act would be internationally wrongful if committed by that organisation.²⁴⁰

Recalling the EU's supra-national structure, its acts and omissions often overlap with that of member states. The following provision is critical for apportioning legal liability in instances of the aforementioned overlap:

Where an international organisation and one or more states or other international organisations are responsible for the same internationally wrongful act, the responsibility of each entity may be invoked in relation to the act.²⁴¹

If breach of an internationally unlawful act is committed; attribution and lack of justification can be proved against the EU and the member states, they can collectively, separately or one of them can be held liable under international law.

Below is a discussion on the European Agenda on Migration (EAM)

5:3 THE EUROPEAN AGENDA ON MIGRATION

Migration policies are now at the top of the EU policy agenda.²⁴² It's difficult to envisage that this will change anytime in the near future.²⁴³ Each of the relevant European institutions has positioned the migration issue at the heart of their respective agendas.²⁴⁴ During this same period a whole series of initiatives have been put on the table and heatedly discussed between the relevant institutional actors and EU member states, and indeed with third countries.²⁴⁵ These have been accompanied by a succession of inconclusive extraordinary summits and conferences reporting

²³⁹ Ibid Article 8

²⁴⁰ ILC (DARIO) supra note 234 Article 14

²⁴¹ ILC supra note 234 Article 48

²⁴² European Commission op cit note 1 page 1

²⁴³ Ibid

²⁴⁴ Ibid

²⁴⁵ Ibid

mixed and obscure results about the kind of concrete steps the EU might take. The resulting picture is difficult for the general public to fully grasp.²⁴⁶

The EAM brings together the different steps the EU should take now, and in the coming years, to build up a coherent and comprehensive approach to reap the benefits and address the challenges deriving from migration.²⁴⁷ The Agenda is a political document outlining priorities in migration, asylum and borders policies for the years to come.²⁴⁸ The document sets out a comprehensive approach to migration management, comprising immediate action and longer-term measures.²⁴⁹

The scope of this thesis is limited to the Immediate Action under the EAM specifically addressing the Africa-EU irregular mass-migration. Resultantly, special emphasis is placed on Italy when analysing the actions of the EU and the member states towards asylum-seekers and refugees inside the EU since Italy is the major terminus of the irregular migration.

5:3:1 IMMEDIATE ACTION UNDER THE EUROPEAN AGENDA ON MIGRATION

Below is the European Commission's introduction to the Immediate Action under the EAM:

The first part of the EAM (Immediate Action) responds to the need for swift and determined action in response to the human tragedy in the whole of the Mediterranean.²⁵⁰ This swift response must also serve as the blueprint for the EU's reaction to future crises, whichever part of the common external border comes under pressure from East to West and from North to South.²⁵¹

Below is the analysis of the compatibility of the EAM (Immediate Action) and its implementation with international law. The analysis is done in accordance to the listing of the Immediate Actions in the EAM; 1) Saving Lives at Sea 2) Targeting Criminal Smuggling Networks 3) Responding to high numbers of arrivals within the

²⁴⁶ Ibid

²⁴⁷ European Commission op cit note 1 page 3 para 1

²⁴⁸ Sergio Carrera & Steven Blockmans et al, *The EU's Response to the Refugee Crisis; Taking Stock and Setting Policy Priorities*, Centre for European Policy Studies (CEPS) Page 3, Para 4, https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis_0.pdf (accessed 31/12/17 14.24)

²⁴⁹ ECA op cit note 146 page 12 para 4

²⁵⁰ European Commission op cit note 1 page 3 para 1

²⁵¹ Ibid page 3 para 2

EU: Relocation 4) A common approach to granting protection to displaced persons in need of protection: Resettlement 5) Working in partnership with third countries to tackle migration upstream 6) Using the EU's tools to help frontline Member States.

5:3:1:1 SAVING LIVES AT SEA²⁵²

The European Commission in the EAM states the following in relation to saving lives at sea:

Europe cannot stand by whilst lives are being lost.²⁵³ SAR efforts will be stepped up to restore the level of intervention provided under the former Italian,²⁵⁴ “Mare Nostrum” operation.²⁵⁵ To triple the budget for the Frontex joint-operations *Triton* and *Poseidon*, the Commission has already presented an amending budget for 2015 and will present its proposal for 2016 by the end of May 2015. When implemented, this will expand both the capability and the geographical scope of these operations, so that Frontex can fulfill its dual role of co-ordinating operational border support to Member States under pressure, and helping to save the lives of migrants at sea. In parallel to this increase in EU funding, assets (ships and aircrafts) are being deployed by several Member States.²⁵⁶

In a nutshell, as per the EAM, the EU pledged to step up SAR efforts. It further undertook to triple the budget for operations *Triton* and *Poseidon* so Frontex can play its border support role and save lives at sea. Lastly, it was guaranteed that assets will be deployed by member states to support the above operations.

Below, the author traces the implementation of the Immediate Action after which its compatibility with international law shall be examined:

IMPLEMENTATION

To reinforce its capacity to save lives at sea, the EU significantly enhanced its maritime presence in 2015, tripling the resources and assets available for Frontex Joint Operations *Poseidon* and *Triton*.²⁵⁷ As of 1st November 2014, patrolling activities were taken over by the Frontex-led *Operation Triton*. Unlike *Mare*

²⁵² European Commission op cit note 1 page 3 para 3

²⁵³ Ibid page 3 para 3

²⁵⁴ Ibid page 3 para 3

²⁵⁵ After the ship wreckage off the coast of Lampedusa on 16th October 2013, which cost the lives of 366 Africans, the Italian Government launched a major military-supported humanitarian and border control operation *Mare Nostrum*, which saw both sea and air capabilities deployed in the Italian, Maltese and Libyan SAR zones under the Italian Navy, European Commission op cit note 34 page 3 para 1

²⁵⁶ European Commission op cit note 1 page 3 para 3

²⁵⁷ EEAS, *EU Operations in the Mediterranean Sea*, page 1 para 2, 14th September 2016 https://eeas.europa.eu/sites/eeas/files/5_euoperationsinmed_2pg.pdf accessed 20/8/2017 at 16.41

Nostrum, that preceded it, *Triton* focused more on sea border protection rather than SAR, in the first nine months.²⁵⁸ This attracted heavy criticism from humanitarian agencies.²⁵⁹ In the first quarter of 2015, following its launch, 479 refugees and migrants drowned or went missing, compared to an estimated 15 in the first quarter of 2014.²⁶⁰ “Triton is not a replacement for Mare Nostrum,” Klaus Rosler, Frontex’s operations director stressed,²⁶¹ “*Frontex is not a coordinating body for SAR operations. The responsibility of member states to ensure SAR operations and maritime security on this is not substituted for or suspended by a border surveillance operation.*”²⁶²

2 major shipwrecks between in April 2015, claiming over 1,200 lives proved that Operation *Triton* was inadequate.²⁶³ The EU then reinforced the operation.²⁶⁴ As of 1st July 2015, *Triton* expanded its assets and spread its activities southwards.²⁶⁵ In 2016, 48,800 people were rescued by *Triton*. The 2017 statistics (as of August) show that 6,000 have been rescued.²⁶⁶ On 22nd June 2015, the EU launched *EUNAVFOR MED* (Operation Sophia) (Elaborated upon later in Chapter 5:3:1:2) SAR operations aren’t part of its mandate though its naval and aerial assets have contributed to SAR operations.²⁶⁷ Operations *Triton* and *Sophia* have remained focussed on their respective primary objectives: border control and surveillance; and disrupting smugglers’ business model for *Sophia*.²⁶⁸

Frontex, citing UNHCR and IOM estimates, stated that 2016 (when Operations *Triton* and *Sophia* were in operation) saw the largest number of migrant deaths on record in the Mediterranean (5,083 compared with 3,777 in 2015 and 3,279 in

²⁵⁸ European Commission op cit note 37 page 3 para 4

²⁵⁹ Ibid

²⁶⁰ Wittenberg op cit note 165 page 15 para 6 –Page 16 para 1

²⁶¹ Lizzy Davies & Arthur Neslen, *Italy: end of ongoing sea rescue mission ‘puts thousands at risk*, The Guardian Newspaper, London, <https://www.theguardian.com/world/2014/oct/31/italy-sea-mission-thousands-risk> (accessed 31/10/17 18.05)

²⁶² Ibid

²⁶³ Amnesty International, *A Perfect Storm; The Failure of European Policies in the Central Mediterranean*, 2017, London page 10 para 4 <https://www.amnesty.org/en/documents/eur03/6655/2017/en/> accessed 2/9/2017 at 19.05

²⁶⁴ European Commission op cit note 37 page 3 para 1

²⁶⁵ Ibid page 3 para 4

²⁶⁶ Frontex, *Joint Operation Triton (Italy)*, <http://frontex.europa.eu/pressroom/hot-topics/joint-operation-triton-italy--ekKaes> (accessed 20/8/2017 16.45)

²⁶⁷ Amnesty op cit note 229 page 11 para 1

²⁶⁸ Ibid 19 page 15 para 2

2014).²⁶⁹ There have been 2,244 recorded deaths on the Central Mediterranean route between January and August 2017.²⁷⁰ Even Frontex acknowledges the paradox of the increasing number of migrant deaths, despite the enhanced EU and NGO SAR operations.²⁷¹ Wittenberg argues that these statistics portray the EU's failure at saving lives on the Mediterranean through SAR operations, ²⁷²an argument the author strongly associates with.

As a further reflection of the shortcomings of Operations *Triton* and *Sophia*, their efforts continue to be criticised by humanitarian actors, which has led many private and non-state actors to launch their own SAR operations,²⁷³ which have brought mortality rates down. ²⁷⁴ NGOs were responsible for about 22% of all rescues in the Central Mediterranean in 2016.²⁷⁵ A case can therefore be made that there is a vacuum in SAR operations plausibly from the reluctance of the EU and member states. Perplexing is the hostility of the EU governments towards the NGOs involved in SAR. They argue that SAR operations of NGOs have an “unintended pull factor” as they encourage more migrants to attempt the dangerous sea crossing hence more tragic deaths.²⁷⁶ Others have accused NGOs for colluding with smugglers, claims Italian Parliamentary inquiries refuted.²⁷⁷

From the above analysis of the implementation of the immediate action, the author finds it arguable that Frontex and EU member states prioritise border control over saving the lives of asylum-seekers in distress at sea.

Below is an examination of the international law that governs SAR operations on the sea. This is juxtaposed against the actions and omissions of the EU and member states in relation to saving lives at sea as per the EAM:

²⁶⁹Frontex, *Risk Analysis for 2017*, 2017, Warsaw page 32 para 9, http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf accessed 20/8/2017 at 14.49

²⁷⁰ IOM, *Mediterranean*, <https://missingmigrants.iom.int/mediterranean> accessed 20/8/2017 at 14.43

²⁷¹ Frontex op cit note 269 page 33 para 1

²⁷² Wittenberg op cit note 187 page 16 para 1

²⁷³ Ibid

²⁷⁴ Amnesty op cit note 263 page 17 para 4

²⁷⁵ European Commission op cit note 37 page 4 para 5

²⁷⁶ Allan Travis, *Migrant rescue operations must be stopped at earliest opportunity – minister*, The Guardian Newspaper, 31st October, 2014, London, <https://www.theguardian.com/uk-news/2014/oct/30/home-office-minister-rescue-migrants-must-be-stopped-mediterranean> (accessed 1/9/2017 14.49); Christoph Hasselback, *Opinion: Is refugee rescue attracting more?* Deutsche Welle News, 28th October 2014, Berlin, <http://www.dw.com/en/opinion-is-refugee-rescue-attracting-more/a-18026378> (accessed 1/9/2017 14.55)

²⁷⁷ Amnesty op cit note 263 page 17 para 2

INTERNATIONAL LAW ON SAR OPERATIONS

International treaty obligations are binding only if the parties concerned consent.²⁷⁸ Not all EU member states are bound by the same obligations under international maritime law. For instance, several EU states haven't signed the amended versions of the Convention on Safety of Life at Sea, 1974 and the Convention on Maritime Search and Rescue at Sea, 1979.²⁷⁹ For this reason, emphasis is placed on state responsibilities emanating from customary international law, which is binding on all states, obviously encompassing EU states.

The UNHCR affirms that under international law, there's an obligation to rescue any person in distress at sea including asylum-seekers.²⁸⁰ Vattel and Chitty assert that this duty to render assistance to persons in distress at sea constitutes an ancient and fundamental feature of the law of the sea,²⁸¹ widely recognised as a norm of customary international law.²⁸² A number of international treaties specify elements of this obligation.²⁸³ Provisions of some of these treaties are highlighted below;

“The master of a ship at sea... on receiving a signal ... that persons are in distress at sea, is bound to proceed with all speed to their assistance...”²⁸⁴

“Every State shall require the master of a ship flying its flag... to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance...”²⁸⁵

²⁷⁸ Bennett & Strug op cit note 95 page 12 para 4

²⁷⁹ Euro-Mediterranean Human Rights Network, *Prioritising Border Control over Human lives violations of the Rights of Migrants and Refugees at Sea*, Policy Brief, 2014, Copenhagen, Page 5, Para 5

²⁸⁰ UNHCR, *The Duty to Rescue, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, EC/SCP/18, 26th August 1981, <http://www.unhcr.org/afr/excom/scip/3ae68ccc8/problems-related-rescue-asylum-seekers-distress-sea.html> (accessed 21/8/2017 21.30)

²⁸¹ Emer de Vattel (Joseph Chitty Ed) 2011 *The Law of Nations Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, Cambridge, 1834, Page 170

²⁸² UN, *Articles Concerning the Law of the Sea with Commentaries*, 1956, http://legal.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf (accessed 21/8/2017 19.12)

²⁸³ Violeta Moreno Lax, *Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea*, International Journal of Refugee Law Vol. 23 No. 2, Oxford University Press, Oxford, pp. 174-220 page 194 footnote 129

²⁸⁴ International Maritime Organisation (IMO), *International Convention for the Safety of Life At Sea*, 1974, Chapter V, Regulation 33(1)

Additionally, States are also obliged under international treaty law to develop SAR systems, which can co-ordinate and assist in rescue operations.²⁸⁶ The duty to provide SAR services applies within the State's SAR zone.²⁸⁷ Below are provisions of some key international treaties that divulge the obligations of states in relation to the development and co-ordination of SAR operations;

“...Parties shall, individually or in co-operation with other States, ensure that sufficient search and rescue regions are established within each sea area...”²⁸⁸

“Parties, either individually or in co-operation with other States shall ensure that they are capable on a 24 hour basis of promptly and reliably receiving distress alerts... within their search and rescue regions...”²⁸⁹

Below, the paper argues that the duty to assist people in distress at sea is intertwined with positive obligations connected to the right to life. States therefore have a legal duty to be pro-active in saving people in distress at sea.

DUTY TO ASSIST PERSONS IN DISTRESS AND THE RIGHT TO LIFE

It's clear that the duty to assist ships in distress requires positive action.²⁹⁰ The right to life²⁹¹ is recognised to incorporate positive obligations for states in order to prevent the loss of life.²⁹² In this sense, the duty to assist may be regarded as a special

²⁸⁵ UNGA, *Convention on the Law of the Sea* (UNCLOS) 1982, Article 98(1)

http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf accessed 21/8/2017 at 18.46

²⁸⁶ Ibid Article 98(2)

²⁸⁷ Lisa Marie Komp, *the Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?* in Violeta Moreno-Lax & Efthymios Papastavridis (Eds) *“Boat Refugees” and Migrants at Sea: A Comprehensive Approach Integrating Maritime Security with Human Rights* page 237 para 1

²⁸⁸ International Maritime Organisation (IMO), *International Convention on Maritime Search and Rescue*, (ICMSAR) 1979, Annex, Chapter 2, 2.1.3

²⁸⁹ Ibid Annex, Chapter 4, 4.2.1

²⁹⁰ Komp op cit note 287 page 235 para 2

²⁹¹ Every human being has the inherent right to life... No one shall be arbitrarily deprived of his life, UNGA supra note 81 (ICCPR) Article 6

²⁹² UN, *General comment No. 6: Article 6 (Right to life)*, Para 5, 16th session (1982) General Comments adopted by the Human Rights Committee, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwin0aGJz__VAhXFJMAKHV4aAa4QFggxMAI&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FHRBodies%2FTB%2FHRI-GEN-1-REV-9-VOL-I_en.doc&usg=AFQjCNGXO60wbdxgXXFa3o4agDu1VTDDfA (accessed 30/8/2017 21.01)

corollary to the right to life.²⁹³ The positive dimension under the right to life and under the duty to assist persons in distress at sea rests on states.²⁹⁴

The ECtHR in *Furdik v. Slovakia*²⁹⁵ feasibly made a link between distress and the positive obligations of states in relation to the right to life;

...the State's duty to safeguard the right to life must also be considered to extend to the provision of emergency services... this duty may go beyond the provision of essential emergency services such as fire-brigades and ambulances and... include the provision of air-mountain or air-sea rescue facilities to assist those in distress...²⁹⁶

From the above, it is arguable that the EU and Italy have fallen short in fulfilling their obligations under international law in regard to saving the lives of people in distress. Below, the author portrays the basis under which Italy and the EU can potentially be legally liable under international law:

LIABILITY OF ITALY AND THE EU FOR BREACH OF INTERNATIONAL LAW

International law obligations in relation to saving persons at sea accrue to states.²⁹⁷ In relation to the Africa-EU irregular mass-migration, Italy as a state bears the above obligation since it's a close "safe country" for the vessels which use the Central Mediterranean Route to irregularly access the EU.²⁹⁸ In addition to the duty to rescue persons in distress being customary international law,²⁹⁹ Italy has ratified the UNCLOS³⁰⁰ and ICMSAR³⁰¹, which expressly stipulate the duty of states to conduct SAR operations in their SAR zones.³⁰²

Recalling the possibility of joint liability of the EU and member states alluded to earlier,³⁰³ the EU is potentially legally liable as well. Under Article 6 of the DARIO,³⁰⁴

²⁹³ Komp op cit note 287 page 237 para 1

²⁹⁴ UNGA (UNCLOS) supra note 285 Article 98(2); IMO (ICMSAR) supra note 288 Article 2.1.2 of the Annex

²⁹⁵ EctHR, 4th Section Decision as to the Admissibility of Application No. 42994/05 by Milan Furdik against Slovakia, [http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-90321%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-90321%22]}) accessed 30/8/2017 at 22.30

²⁹⁶ Ibid

²⁹⁷ UNHCR op cit note 248

²⁹⁸ The distance between Libya (Tripoli) and Italy (Lampedusa) is 296.66 km, <https://www.distancefromto.net/between/Tripoli/Lampedusa> (accessed 8/2/17 10.39)

²⁹⁹ Emer de Vattel (Joseph Chitty Ed) op cit note 281

³⁰⁰ UN, *UN Treaty Collection*; UNCLOS, <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280043ad5> (accessed 8/11/2017 13.00)

³⁰¹ Italian Coast Guard, *Introduction*, <http://www.guardiacostiera.gov.it/en/Pages/search-and-rescue.aspx> (accessed 8/11/2017 at 13.04)

³⁰² UNGA UNCLOS Article 98(2) & IMO, ICMSAR Annex, Chapter 2, 2.1.3, Annex, Chapter 4, 4.2.1

³⁰³ ILC, DARIO supra note 200 Article 48

³⁰⁴ Ibid Article 6

Frontex and its agents are an organ and agents of the EU respectively. The EU is hence accountable for the conduct of Frontex under international law. The EU therefore bears legal liability for Frontex's failure to save the lives of those in distress at sea and uphold the right to life.³⁰⁵ Italy and the EU are hence potentially jointly liable for the failure to save lives of people in distress in the Mediterranean.

Below is an assessment of the compliance of the second EAM Immediate Action (Targeting criminal smuggling networks) with international law

5:3:1:2 TARGETING CRIMINAL SMUGGLING NETWORKS

The European Commission plan for targeting criminal smuggling networks in the EAM is as follows:

The criminal networks, which exploit vulnerable migrants, must be targeted. The High Representative/Vice President (HR/VP) presented options for possible Common Security and Defence Policy (CSDP) operations to systematically identify capture and destroy vessels used by smugglers. Such action under international law will be a powerful demonstration of the EU's determination to act.³⁰⁶ More will be done to pool and better use information to identify and target smugglers. Europol will immediately strengthen its recently established Joint Maritime Information Operation (JOT MARE) and its focal point on migrant smuggling. The result will be a single entry point for inter-agency cooperation on smuggling. Frontex and Europol will also develop profiles of vessels that could be used by smugglers, following patterns to identify potential vessels and monitor their movements. Finally, Europol will identify illegal internet content used by smugglers to attract migrants and refugees, and request its removal.³⁰⁷

In summary, the EU has undertaken to use armed force against people smugglers. It also intends to intercept and disrupt online communications between people smugglers and potential migrants. Both these measures fall under within spheres regulated by international law. The use of force by the EU and whether it conforms to international law will be examined after a review below of how criminal smuggling networks have been targeted by the EU.

IMPLEMENTATION

To take urgent action against traffickers and human smugglers in the Central Mediterranean, *Operation Sophia* was launched on 22nd June 2015. It operates within the Libyan SAR with the ships remaining strictly outside Libyan territorial

³⁰⁵ Frontex op cit note 271; Wittenberg op cit note 272

³⁰⁶ European Commission op cit note 1 page 3 para 4

³⁰⁷ Ibid pages 3-4

waters.³⁰⁸ *Sophia*'s objective is to contribute to the wider EU efforts to disrupt the business model of criminal networks in the Central Mediterranean and thus prevent further loss of life at sea.³⁰⁹ On 25th July 2017, the Council extended the mandate of Operation Sophia until 31 December 2018.³¹⁰

The operation's core mandate is to identify, capture and dispose of vessels and enabling assets used or suspected of being used by migrant smugglers or traffickers. The operation is designed around 4 phases. The 1st phase, (concluded) saw the deployment of forces to build a comprehensive understanding of smuggling activity and methods. Currently the operation is in its 2nd phase, which implies the search, boarding, seizure and diversion of smugglers' vessels on the high seas under conditions provided for by applicable international law. Future phases, subject to the necessary legal framework established by UN Security Council Resolutions, will include taking operational measures against vessels and related assets suspected of being used by human smugglers or traffickers inside coastal states territory. All activities as per the EU undertaken by the operation adhere to and are conducted under full respect of international law, including human rights, humanitarian and refugee law and the principle of non-refoulement.³¹¹

Below is an interrogation of the international law applicable to the use of armed force as well as sovereignty, while revealing how the actions of the EU have been in compliance with the aforementioned international law:

INTERNATIONAL LAW, USE OF FORCE AND SOVEREIGNTY

The UN Charter is unequivocal in asserting that all member states shall not use force or threaten its use against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the UN.³¹² Further, the Charter authorises the Security Council to use armed force as may be necessary for the maintenance or restoration of international peace and security.³¹³

³⁰⁸ European Commission, op cit note 37 page 3 para 5

³⁰⁹ EEAS op cit note 257 page 2 para 2

³¹⁰ European Council & Council of the EU, *EUNAVFOR MED Operation Sophia: mandate extended until 31 December 2018*, <http://www.consilium.europa.eu/en/press/press-releases/2017/07/25-eunavformed-sophia-mandate-extended/> accessed 6/9/2017 at 15.35

³¹¹ EEAS op cit note 257 page 2 para 3

³¹² United Nations, *Charter of the United Nations*, 1945 Article 2(4)

³¹³ Ibid Article 42

The EU has abided by international law in two ways: First, it has ensured that the vessels used in Operation Sophia strictly stay out of Libyan territorial waters³¹⁴ as mandated by Article 2(4) of the UN Charter. Secondly, it has obtained a UN Security Council authorising the use of force prior to the use of force against the criminal smuggling networks.³¹⁵

Below is an examination of the compliance of the third Immediate Action under the EAM with international law.

5:3:1:3 RESPONDING TO HIGH-VOLUMES OF ARRIVALS WITHIN THE EU: RELOCATION³¹⁶

The European Commission plan for the above Relocation in the EAM is as follows:

Member States' asylum systems today face unprecedented pressure. The EU shouldn't wait until the pressure is intolerable to act: the volumes of arrivals mean that the capacity of local reception and processing facilities is already stretched thin. To deal with the situation in the Mediterranean, the Commission will, by the end of May, propose triggering the emergency response system envisaged under Article 78(3) TFEU. The proposal will include a temporary distribution scheme for persons in clear need of international protection to ensure a fair and balanced participation of all member states to this common effort. The receiving member state will be responsible for the examination of the application in accordance with established rules and guarantees. A redistribution key based on criteria such as GDP, size of population, unemployment rate and past numbers of asylum seekers and of resettled refugees shall be used.³¹⁷

This step will be the precursor of a lasting solution. The EU needs a permanent system for sharing the responsibility for large numbers of refugees and asylum-seekers among member states. The EC will table a legislative proposal by the end of 2015 to provide for a mandatory and automatically triggered relocation system to distribute those in clear need of international protection within the EU when a mass influx emerges. The scheme will take account of the efforts already made on a voluntary basis by Member States. Pending the implementation of these 2 measures, Member States will need to show solidarity and redouble their efforts to assist those countries on the frontline.³¹⁸

³¹⁴ European Commission op cit note 308

³¹⁵ EEAS, *Statement of the HR/VP Federica Mogherini on the vote of UN resolution 2240 on EU naval operation in the Mediterranean*, 9th October 2015, https://eeas.europa.eu/headquarters/headquarters-homepage/3132/statement-hrvp-federica-mogherini-vote-un-resolution-2240-eu-naval-operation-mediterranean_en (accessed 8/11/2017 16.17)

³¹⁶ "Relocation" means a distribution among Member States of persons in clear need of international protection, European Commission op cit note 161 page 19 Annex

³¹⁷ European Commission op cit note 1 page 4 para 2

³¹⁸ Ibid page 4 para 3

In summary, the European Commission mooted to suspend the EU “Dublin System”³¹⁹ in order to relieve the pressures of the migration “crisis” on the frontline states. Further, the Commission adopted a proposal for the temporary redistribution of migrants from Italy and Greece to all the other EU member states so that burdens of the EU migration “crisis” are collectively borne by all EU member states in solidarity with the frontline states. These EU measures shall be juxtaposed with the applicable international law to test their compliance with international law after a review of their implementation below:

IMPLEMENTATION

This has been one of the most controversial ideas for dealing with the “crisis”; the main contribution of the initiative has been to derogate temporarily the guiding rule under the “EU Dublin system.”³²⁰ Under the EC’s initiative, EU states through a Home Affairs Ministers’ decision, adopted a decision for the relocation of 40,000 refugees from Italy and Greece though as a first step agreed to the relocation of 32,256 persons.³²¹ In September 2015, the EC proposed an emergency relocation mechanism for 120,000 refugees from Italy, Greece and other states directly affected by the “crisis” which the European Parliament voted in support of and the Home Affairs Ministers adopted.³²² 24, 676 people have been relocated since the launch of the scheme as of 24 July 2017; 7,873 from Italy.³²³

On the 26th September 2017, the Relocation scheme, which aimed at distributing 160,000 ended.³²⁴ As of 4th September 2017, just 27,695 refugees had been

³¹⁹ European Commission op cit note 25

³²⁰ Carrera & Blockmans et al op cit note 248 page 5 para 3

³²¹ Council of the EU, *Resolution of the Representatives of the Governments of the Member States meeting within the Council on relocating from Greece and Italy 40,000 persons in clear need of international protection*, Brussels, 22nd July, 2015 <http://data.consilium.europa.eu/doc/document/ST-11131-2015-INIT/en/pdf> (accessed 15/8/2017 12.19)

³²² European Commission, *EC Statement following the decision at the Extraordinary Justice and Home Affairs Council to relocate 120,000 refugees*, 22nd September 2015, Background, http://europa.eu/rapid/press-release_STATEMENT-15-5697_en.htm (accessed 15/8/2017 12.27)

³²³ European Commission, *Relocation and Resettlement*, 26th July, 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170726_factsheet_relocation_and_resettlement_en.pdf (accessed 15/8/2017 12.30)

³²⁴ Amnesty International, *EU: Countries have fulfilled less than a third of their Asylum Relocation promises*, 25th September 2017, <https://www.amnesty.org/en/latest/news/2017/09/eu-countries-have-fulfilled-less-than-a-third-of-their-asylum-relocation-promises/> accessed 3/2/2017 13.29

relocated.³²⁵ According to Amnesty International, European countries have utterly failed to fulfill their commitments to relocate asylum-seekers from Greece and Italy.³²⁶ Among the worst offenders are Poland and Hungary, both of which refused to accept a single asylum-seeker from Italy and Greece.³²⁷ The huge failure of the EU Relocation scheme has been met by heavy criticism from international organisations, UN agencies, EU institutions, and the European public, which perceive the limited progress as reflecting a lack of commitment to the cause.³²⁸ The EC has done its best to ensure the success of the plan but has been frustrated by the lack of political will from states.³²⁹

Amnesty warns that the EU states must step up and make good on their promises, or risk being taken to the European Court and potentially facing tough penalties since the relocation is a legal obligation.

INTERNATIONAL LAW AND EU RELOCATION

As previously discussed (Refer to Chapters 2:1 and 2:1:1), states have no legal obligations under international law to accept asylum-seekers and refugees since, since it's an area over which states exercise sovereignty and discretion.

According to the UNHCR, an asylum-seeker may be refused a determination of his or her claim in the country where the application has been made, if the responsibility for assessing the particular asylum application is assumed by a 3rd country; provided there's no risk of persecution in that country, there are sufficient guarantees that the asylum-seeker will be admitted, be protected from refoulement, have the possibility of his/her protection needs fairly assessed through an effective national procedure, and be treated throughout in accordance with accepted international standards.³³⁰ As per the author, the EU Relocation Scheme complies with the

³²⁵ Jacopo Barigazzi, *Brussels to end mandatory refugee relocation (for now)*, Politico Magazine, <http://www.politico.eu/article/brussels-to-end-mandatory-refugee-relocation-for-now/> (accessed 22/9/2017 15.27)

³²⁶ Amnesty International op cit note 324

³²⁷ Amnesty International op cit note 324

³²⁸ Wittenberg op cit note 187 page 14 para 5 – page 15 para 1

³²⁹ Ibid

³³⁰ UNHCR, *Convention Plus Issues Paper submitted by UNHCR on addressing Irregular Secondary Movements of Refugees and Asylum-seekers*, FORUM/CG/SM/03, 11th March 2004, Page 8, Para 5, <http://www.unhcr.org/afr/protection/convention/407110d03/issues-paper-submitted-unhcr-addressing-irregular-secondary-movements-refugees.html?query=convention> accessed 8/9/2017 at 7.17

criterion for relocation laid out above by the UNHCR and hence conforms with international law.

The only concerns under international law are moral and humanitarian ones. The Relocation Scheme is generally acknowledged as a failure since less than a third of the eligible candidates have been relocated.³³¹ The bulk of them remain in Italy and Greece, states whose capacity for hosting irregular migrants and asylum-seekers has been overrun, with the bulk of them living under dire conditions. The despicable conditions were authoritatively revealed in the *MSS vs. Belgium Case*, which led to the suspension of the Dublin transfers to Greece by member states.³³² The Court found that Belgium violated Article 3 of the ECHR (prohibiting torture, inhuman or degrading treatment or punishment) by sending the applicant back to Greece; exposing him to risks linked to the deficiencies in the Greek asylum procedure as well as exposing him to detention and living conditions in breach of the ECHR.³³³ In relation to Italy, the ECtHR held that there are “serious doubts” about the capacity of the reception system for asylum-seekers in Italy, with reports of over-crowding and poor conditions.³³⁴

It’s noteworthy that though the EU states may not be liable under international law, they are plausibly liable under EU law since the Relocation scheme is legally binding.³³⁵

Below is an examination of the compliance of the 4th Immediate Action under the EAM with international law.

5:3:1:4 A COMMON APPROACH TO GRANTING PROTECTION TO DISPLACED PERSONS IN NEED OF PROTECTION: RESETTLEMENT ³³⁶

The European Commission plan for the above Resettlement in the EAM is as follows:

³³¹ Amnesty International op cit note 324

³³² European Commission, *EU Asylum: Judgement of the ECtHR on the transfer of asylum seekers under the EU Dublin Regulation*, http://europa.eu/rapid/press-release_MEMO-14-1401_en.htm (accessed 4/2/2017 14.29)

³³³ ECtHR supra note 32

³³⁴ European Commission op cit note 332

³³⁵ Amnesty International op cit note 324

³³⁶ “Resettlement” means the transfer of individual displaced persons in clear need of international protection, on submission of the UNHCR and in agreement with the country of resettlement, from a third country to a Member State, where they will be admitted and granted the right to stay and any other rights comparable to those granted to a beneficiary of international protection, European Commission op cit note 1 page 19: Resettlement

In addition to the relocation of those already on EU soil, the EU has a duty to contribute its share in helping displaced persons in clear need of international protection. This is a joint responsibility of the international community, with the UNHCR given the task of identifying when people cannot stay safely in their own countries. Such vulnerable people cannot be left to resort to the criminal networks of smugglers and traffickers. There must be safe and legal ways for them to reach the EU. The UNHCR has endorsed a target of 20,000 resettlement places for the EU per year by the year 2020. Some member states have already made a major contribution to global resettlement efforts. But others offer nothing and in many cases aren't making an alternative contribution in terms of receiving and accepting asylum requests or helping to fund the efforts of others.³³⁷

By the end of May, the Commission will make a Recommendation proposing an EU-wide resettlement scheme to offer 20,000 places. This scheme will cover all member states, with distribution criteria such as; GDP, size of population, unemployment rate and past numbers of asylum seekers and of resettled refugees, and will take account of the efforts already made on a voluntary basis by member states. The EU budget will provide dedicated funding of an extra EUR 50 million in 2015/2016 to support this scheme. If necessary this will be followed up with a proposal for a binding and mandatory legislative approach beyond 2016. In addition to this common effort, the Commission calls on member states to make use of the existing possibilities offered under the Asylum Migration and Integration Fund and pledge further resettlement places under their national programming, with the funding swiftly adjusted.³³⁸ In addition, Member States should use to the full the other legal avenues available to persons in need of protection, including private/non-governmental sponsorships and humanitarian permits, and family reunification clauses.³³⁹

In summary, the European Commission decided that in addition to relocating vulnerable people on EU soil, EU states should fulfil their international obligations by co-operating with the UNHCR through receiving vulnerable people who have been earmarked for resettlement by the organisation. The EU resettlement plans are juxtaposed with the applicable international law to test their compliance with international law after a review of their implementation below:

IMPLEMENTATION

As regards resettlement, the implementation of the *July 2015 Conclusions* to resettle 22,504 people is well on track with over two thirds of the agreed number already resettled. This represents significant progress compared to the limited numbers Member States resettled in 2014 and 2015 via national or multi-lateral schemes and demonstrates the added value of strengthened EU-level cooperation.³⁴⁰ The EU

³³⁷ European Commission op cit note 1 page 4 para 5

³³⁸ Ibid page 5 para 1

³³⁹ Ibid para 2

³⁴⁰ European Commission, *Report from the Commission to the European Parliament, the European Council and the Council*, 12th Report on Relocation and Resettlement, 16th May 2017, Strasbourg

Member States received over 14,205 resettled refugees in 2016 via national and multilateral schemes. This is a significant increase in comparison to 8,155 people resettled in 2015 and 6,550 in 2014.³⁴¹ Progress continues to be observed in the implementation of the *Conclusions of 20 July 2015*, with over two thirds of the 22,504 resettlements agreed already completed. Since 10 April 2016, 671 people have been resettled under the scheme.³⁴² As of 12th May 2017, 16,163 people have been resettled to 21 States. 10 out of the 28 Member States have not yet resettled under this scheme.³⁴³

A majority of States participating in the scheme to implement the *Conclusions of 20 July 2015* indicated that their resettlement efforts were primarily, but not exclusively, directed at Syrians staying in Jordan, Lebanon and Turkey.³⁴⁴ The EU resettlement scheme is currently plausibly aimed at refugees in the aforementioned states³⁴⁵ However, there are now proposals to encompass African countries as well; The EC is set to launch a new resettlement pledging exercise in conjunction with the UNHCR starting with those in need of international protection from Libya, Egypt, Niger, Ethiopia and Sudan.³⁴⁶

INTERNATIONAL LAW AND EU RESETTLEMENT

As previously discussed, (under Chapters 2:1 and 2:1:1), international law doesn't impose on states the duty to resettle refugees and asylum-seekers. Nonetheless, by resettling refugees, the EU and member states fulfill their international obligations under the Refugee Convention. However, considering that the EU resettlement policy favours Syrians staying in Jordan, Lebanon and Turkey over other refugees in various parts of the world, the EU and the member states are potentially liable under

https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170516_twelfth_report_on_relocation_and_resettlement_en.pdf page 3 para 2 (accessed 11/2/2017 20.06)

³⁴¹ Ibid page 9 para 1

³⁴² European Commission op cit note 240 page 9 para 2

³⁴³ Ibid para 3

³⁴⁴ Ibid para 4

³⁴⁵ Mark Stone, 'Take migrants from Libya' EU Commission tells member states, Sky News, Para 6, <http://news.sky.com/story/take-migrants-from-libya-eu-commission-tells-member-states-10937020> (accessed 16/8/2017 12.01)

³⁴⁶ European Commission, *Central Mediterranean Route: Commission proposes Action Plan to support Italy, reduce pressure and increase solidarity : Reinforce actions to reduce migratory pressure on Libya and fight smuggling and human trafficking*, 4th July 2017, Strasbourg, http://europa.eu/rapid/press-release_IP-17-1882_en.htm (accessed 16/8/2017 12.06)

international law for discrimination of refugees, contrary to the Refugee Convention.³⁴⁷

Below is a discussion on the compliance of the 5th Immediate Action under the EAM with international law.

5:3:1:5 WORKING IN PARTNERSHIP WITH THIRD COUNTRIES TO TACKLE MIGRATION UPSTREAM

The European Commission plan for working in partnership with third countries to achieve the above goal is stipulated in the EAM as follows:

The EC and the EEAS will work together with partner countries to put in place concrete measures to prevent hazardous journeys.³⁴⁸ First, the EU should step up its support to the countries bearing the brunt of displaced refugees. Regional Development and Protection Programmes will be set up or deepened, starting in North Africa and the Horn of Africa. EUR 30 million will be made available in 2015/2016 and should be complemented by additional contributions from member states.³⁴⁹

Secondly, a pilot multi-purpose centre will be set up in Niger by the end of the year. Working with the IOM, the UNHCR and the Niger authorities, the centre will combine the provision of information, local protection and resettlement opportunities for those in need. Such centres in countries of origin or transit will help to provide a realistic picture of the likely success of migrants' journeys, and offer assisted voluntary return options for irregular migrants. There's an assumption here that the irregular migrants are economic migrants and have a choice of returning home.³⁵⁰

Thirdly, migration will become a specific component of on-going CSDP missions already deployed in countries like Niger and Mali, which will be strengthened on border management. A dedicated summit will be organised in Malta in the autumn with key partners, including the AU, to develop a common approach with the region addressing the causes of irregular migration and the protection of people in need, as well as smuggling and trafficking of people.³⁵¹ This work will be closely connected to broader political initiatives to promote stability. Of particular importance is the action led by the HR/VP to address the situation in Libya, with full support to the UN-led efforts to encourage the process of setting up of a government of national unity.³⁵²

In summary, the European Commission resolved that the EC and EEAS will work with third countries to prevent people from making the journey to the EU. The EU intends to do this in the following ways: a) Enhancing support to migrant hosting

³⁴⁷ UNGA supra note 10 Article 3

³⁴⁸ European Commission op cit 1 page 5 para 3

³⁴⁹ European Commission op cit 1 page 5 para 4

³⁵⁰ Ibid para 5

³⁵¹ Ibid para 6

³⁵² Ibid para 7

countries b) Spurring economic development through financial contributions from the EU and member states c) Establishing multi-purpose centres in countries of origin and transit to discourage and prevent irregular journeys to Europe d) Making migration a specific component of the CSDP missions e) Working in partnership with other stakeholders to address causes of irregular migration and the protection of vulnerable people f) Engaging in political initiatives to promote stability most especially in Libya.

Below is a review of the implementation of the partnership between the EU and African states for the tackling of upstream migration:

IMPLEMENTATION

The EU is using a range of financial instruments to support the implementation of the Partnership Framework, most prominently the EU Trust Fund for Africa (EUTF).³⁵³ The EU has increased its interaction with the Sub-Saharan neighbours of Libya, to address the northbound irregular migratory flows arguably best defined by the by EU on 5th June 2017, announcing its intention to support the operationalisation of the G5 Joint Force (composed by forces from Mali, Mauritania, Niger, Nigeria and Chad) for securing sensitive border regions.³⁵⁴

These so-called tailored “compacts” with key third countries are being developed according to the situation and needs of each partner country; depending on whether they’re a country of origin, transit or one hosting many displaced persons.³⁵⁵ In this context, the EU uses all policies and instruments at its disposal, such as development policies, trade policies and financial assistance.³⁵⁶ Without concrete results from the partner countries in managing migration better, the EU reviews its engagement and financial aid.³⁵⁷ The compacts serve the following purpose in the short term: save lives in the Mediterranean Sea, increase rates of return to countries of origin and

³⁵³ European Commission, *Partnership Framework on Migration: Commission reports on results and lessons learnt one year on*, 13th June 2017, Brussels, http://europa.eu/rapid/press-release_MEMO-17-1606_en.htm (accessed 2/11/2017 20.38)

³⁵⁴ Ibid

³⁵⁵ European Commission, *Commission announces new Migration Partnership Framework: Reinforced Cooperation with Third Countries to better manage Migration*, 7th June 2016, Strasbourg, http://europa.eu/rapid/press-release_IP-16-2072_nl.htm (accessed 5/9/2017 11.42)

³⁵⁶ Ibid

³⁵⁷ Ibid

transit, and enable migrants and refugees to stay close to home to avoid people taking dangerous journeys.³⁵⁸

Documents published by the European Commission on the Partnership Framework provide many examples of possible forms of co-operation, such as stricter border management in Libya and possibly in Egypt and Tunisia, the organisation of asylum procedures for the EU in Libya or other third countries, improved border management in countries such as Niger to avoid irregular migration to Libya or Algeria, re-admission agreements with Nigeria for its own nationals, projects in Mali to strengthen voluntary return of migrants in transit, collaboration with Ethiopia to speed up the return process of its own nationals.³⁵⁹

Below, the author argues that the partnership in the EAM between the EU and African states is actually a vehicle for EU border and migration externalisation:

EU BORDER EXTERNALISATION THROUGH THE PARTNERSHIPS

Externalisation of migration controls describes extra-territorial state actions to prevent migrants from entering their legal jurisdictions or territories.³⁶⁰ These actions entail unilateral, bilateral, multi-lateral state engagement as well as the enlistment of private actors.³⁶¹ These may include direct interdiction and preventive policies as well as more indirect actions, such as the provision of support for or assistance to security or migration management practices in and by third countries.³⁶² Third countries enlisted in the prevention of onward movement of migrants and asylum seekers are at least implicitly encouraged to prevent migrants and asylum-seekers from entering their territories or to apprehend and return them.³⁶³ Externalisation is often deceptively framed as either or both a security

³⁵⁸ European Commission op cit note 255; The Netherlands Institute for Human Rights (NIHR) *Human Act or Devil's Pact? Human rights aspects of migration agreements between EU and third countries*, May 2017, page 7 para 2, http://www.commissie-meijers.nl/sites/all/files/media/paper_human_act_or_devils_pact_eng_def_18.05.2017.pdf (accessed 3/11/2017 11.18)

³⁵⁹ NIHR op cit note 358 page 7 para 4

³⁶⁰ Emma Haddard, *The External Dimension of EU Refugee Policy: A New Approach to Asylum?*, Government and Opposition (an international journal of comparative politics), 2008, Page 119, <http://onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00250.x/abstract> (accessed 3/9/2017 20.29)

³⁶¹ Ibid

³⁶² Ibid

³⁶³ Ibid

imperative and a life-saving humanitarian endeavour.³⁶⁴ Control of migration flows is cast as an effort to prevent “illegal” (or irregular) immigration or to protect migrants from the dangers of the journey.³⁶⁵ Externalisation is also framed as an exercise in capacity-building for countries of origin, countries of first arrival, and transit countries;³⁶⁶ capacity building for rule of law, human rights, conflict resolution, good governance, ³⁶⁷ migration control and management.³⁶⁸

The EU Member States have increasingly moved border management activities beyond their territorial borders, extending border control activities to the high seas and third countries.³⁶⁹ Through the EU partnership with African states to establish concrete measures to prevent hazardous journeys, what has resulted is an externalisation of EU border control and management.³⁷⁰ Consequently, individuals seeking international protection are often pushed away from Europe.³⁷¹ As EU Member States increasingly transfer migration management onto cooperating non-EU states, the human toll of exclusion and the brutality of border management are hidden from the European social, legal and political landscape.³⁷² Resultantly, irregular migrants often find themselves especially vulnerable to human-rights violations.³⁷³

From the above discussion, it’s plausible that the underlying aim of the EU-Africa partnerships is the tightening of border controls in African states to curtail the

³⁶⁴ Ibid

³⁶⁵ Bill Frelick, Ian M. Kysel & Jennifer Podkul, The Impact of Externalisation of Migration controls on the Rights of Asylum Seekers and other Migrants, *Journal on Migration and Human Security*, Volume 4 Number 4, 2016: 190-220, New York, page 193 para 3, https://www.hrw.org/sites/default/files/supporting_resources/jmhs.pdf (accessed 3/11/2017 13.52)

³⁶⁶ International Federation of Red Cross and Red Crescent Societies, *Statement on the Valletta Summit on Migration*, 2015, Ibid 172 (Frelick), Page 194, Para 3

³⁶⁷ Haddard op cit note 360 pages 202-204

³⁶⁸ Frelick et al op cite note 365 page 195 para 2

³⁶⁹ EUAFR op cite note 93 page 11 para 2

³⁷⁰ European Centre for Constitutional and Human Rights (ECCHR) *EU Border Enforcement and Externalisation*, page 1 para 1 Berlin, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwit4qvchobWAhVfGsAKHSZmCRMQFggqMAA&url=https%3A%2F%2Fwww.ecchr.eu%2Fen%2Four_work%2Finternational-crimes-and-accountability%2Fspain%2Fmelilla.html%3Ffile%3Dtl_files%2FDokumente%2FUniverselle%2520Justiz%2FMelilla_ECHR_Q%2526A.pdf&usq=AFQjCNHVyrItrvz2N31cFQ2fhslfYJNmHw (accessed 2/9/2017 10.28)

³⁷¹ Ibid page 7 para 2

³⁷² Ibid

³⁷³ Ibid

movement of migrants mainly from Sub-Saharan Africa to Northern Africa as well as from Northern Africa to the EU.

Below is an assessment of the potential international law violations by the EU and Italy as a result of the EU border externalisation policy in Africa. Libya is used as a case study for the migration partnerships that the EU has with African states. Libya is selected because owing to space and time issues, the partnerships with all African states cannot be reviewed. Additionally, Libya, currently is the most crucial migration partner for the EU in Africa as discussed in Chapter

INTERNATIONAL LAW VIOLATIONS IN LIBYA OWING TO EU BORDER EXTERNALISATION

According to the European Commission,

...To effectively cope with this current migration “crisis”, part of the answer must lie in the Libyan authorities preventing smugglers from operating and for the Libyan Coast Guard to have the capacity to better manage maritime border and ensure safe disembarkation on the Libyan coast... ³⁷⁴

From the above, it’s arguable that the EU is pivoting its border externalisation policy on Libya; essentially aiming to prevent migrants from leaving Libya as way of curbing the EU migration “crisis”. This contravenes international law because it amounts to refoulement and a breach of the right to seek asylum, examined next:

a) REFOULEMENT

As thoroughly discussed earlier, (Refer to Chapter 2:1:1:2), the principle of non-refoulement is enshrined in the Refugee Convention. Additionally, it’s generally regarded to constitute customary international law and also considered to be *jus cogens*.

In June 2016, *Operation Sophia*’s mandate was broadened to include capacity building and training of the Libyan Navy and Coastguard.³⁷⁵ The long-term objective of these actions is to enable Libyan authorities designate a SAR area.³⁷⁶

³⁷⁴ European Commission op cit note 1 page 6 para 3

³⁷⁵ European Council & Council of the EU op cit note 310

³⁷⁶ European Commission op cit note 21 Page 7 para 5

In relation to the above, Amnesty International testified before the UK Parliament EU Committee that it was “dismayed” by the approach of “seeking to simply stop migration out of Libya via the sea route”, because this had the “prospect of returning or trapping people in a profoundly unsafe situation in the country”. In the absence of “any fundamental improvement in the human rights and humanitarian situation or capacity in Libya”, the EU’s focus on the Libyan coastguard risked “prolonging and exacerbating risk to human rights violation.”³⁷⁷ The position of Amnesty International reflects that of the author. Considering the above mandate of *Operation Sophia* and the concerns of Amnesty International, it’s arguable that the actions of the EU amount to refoulement.

The case for refoulement in Libya through the actions of the EU is reinforced by the fact that Libyan law criminalises undocumented entry, exit, and stay in Libya, punishable by imprisonment, and in some cases forced labour or a fine.³⁷⁸ Libyan immigration law doesn’t distinguish between migrants, refugees, asylum-seekers, victims of trafficking, or other vulnerable groups.³⁷⁹ Libya has not ratified the 1951 Refugee Convention.³⁸⁰

Moreover, the evidence of brutality against migrants in Libya is overwhelming.³⁸¹ A December 2016 report from the OHCHR and the UN mission in Libya documented widespread arbitrary detention, inhumane detention conditions, torture and other ill treatment, forced labour, sexual violence, abuses by groups pledging allegiance to ISIL, malnutrition and abuses in immigration detention centres.³⁸² As a general rule, Libyan forces disembark people they rescue or intercept at sea in Libya,³⁸³ where they are extremely vulnerable to widespread human rights violations.³⁸⁴ It’s worth

³⁷⁷ UK Parliament (House of Lords EU Committee) *Operation Sophia: A Failed Mission*, 2nd Report of Session 2017-19 page 13 para 41 <https://publications.parliament.uk/pa/ld201719/ldselect/ldEUcom/5/5.pdf> (accessed 9/9/2017 13.43)

³⁷⁸ Human Rights Watch (HRW) *EU: Shifting Rescue to Libya Risks Lives Italy Should Direct Safe Rescues*, 19th June 2017, <https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives> (accessed 4/9/2017 23.52)

³⁷⁹ Ibid

³⁸⁰ Ibid

³⁸¹ Ibid

³⁸² OHCHR & UN Support Mission in Libya (UNSML) “*Detained And Dehumanised*” Report on Human Rights Abuses against Migrants in Libya, 13th December 2016, http://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf (accessed 4/9/2017 23.57)

³⁸³ HRW op cit note 378

³⁸⁴ OHCHR & UNSML op cit note 382

noting that the IOM reports of slavery in Libya.³⁸⁵ It's now a well-established principle that the "prohibition against slavery and slavery-related practices" has achieved the level of customary international law and has attained the status of *jus cogens*.³⁸⁶

b) RIGHT TO SEEK AND OBTAIN ASYLUM

As thoroughly discussed previously under Chapter 5:3:1:5, the EU border externalisation, the prevention of asylum-seekers from reaching Libya as well as the prevention of asylum seekers from leaving Libya for the EU potentially violate the right to seek and obtain asylum. These actions contravene international law.

Below, the legal liability of the EU for breach of international law is established:

LEGAL LIABILITY OF THE EU

The EU is feasibly liable for the commission of refoulement in Libya. The EU satisfies the requirements under Article 14 of the DARIO³⁸⁷ for international responsibility for an internationally wrongful act by an international organisation. The EU by assisting and aiding Libya in refouling migrants and asylum-seekers is responsible for committing the refoulement because the EU has supported Libya through training and logistics for the purposes of empowering Libya to prevent the departure of asylum-seekers from Libya well aware this prevention by Libya amounts to refoulement. Moreover, further in satisfaction of Article 14 of the DARIO,³⁸⁸ if the acts committed by Libya were done by the EU, it would amount to refoulement. The same legal provisions and arguments applied *mutatis mutandis* can be used to establish the EU's legal liability for the violation of the right to seek and obtain asylum.

Below is a discussion on the compliance of the 6th and last Immediate Action under the EAM with international law.

³⁸⁵ IOM, *IOM Learns of 'Slave Market' Conditions Endangering Migrants in North Africa*, 11th April 2017, <https://www.iom.int/news/iom-learns-slave-market-conditions-endangering-migrants-north-africa> accessed 5/9/2017 at 19.19

³⁸⁶ *Barcelona Traction, Light and Power Company Case (Belgium vs. Spain)* (1970) ICJ Rep 32, Para 34, Identified protection from slavery as one of the 2 examples of obligations *erga omnes* arising out of human rights law

³⁸⁷ ILC, DARIO supra note 334 Article 14

³⁸⁸ Ibid

5:3:1:6 USING THE EU'S TOOLS TO HELP FRONTLINE MEMBER STATES

The European Commission plan for using the EU's tools to help frontline member states is stipulated in the EAM as follows:

More will be done to help deal with the immediate challenge faced by member states in the frontline of migrant arrivals.³⁸⁹ First, the Commission will set up a new “Hotspot” approach, where the EASO, Frontex and Europol will work on the ground with frontline member states to swiftly identify, register and fingerprint incoming migrant. Those claiming asylum will be immediately channelled into an asylum procedure where EASO support teams will help to process asylum cases as quickly as possible. For those not in need of protection, Frontex will help Member States by coordinating the return of irregular migrants. Europol and Eurojust will assist the host Member State with investigations to dismantle the smuggling and trafficking networks.³⁹⁰

Secondly, the Commission will mobilise an additional EUR 60 million in emergency funding, including to support the reception and capacity to provide healthcare to migrants in the member states under particular pressure.³⁹¹

In summary, the European Commission pledged to establish a “Hotspot” approach under which specialised EU agencies will help the frontline EU states deal with the migration “crisis”. Additionally, the Commission committed to the mobilisation of emergency funding to support the frontline states bearing the brunt of the migration “crisis”.

Below is an assessment of the implementation of the last immediate action, focusing entirely on the “Hotspot” approach, after which the compatibility of the approach with international law will be examined. Focus is placed exclusively on the “Hotspot” approach because it's the element of the immediate action that blatantly clashes with international law.

IMPLEMENTATION

Amnesty International referred to the “hotspot approach” as the flagship EU response to the high number of arrivals in Europe's southern countries.³⁹² A hotspot

³⁸⁹ European Commission op cit note 1 page 6 para 1

³⁹⁰ Ibid para 2

³⁹¹ European Commission op cit note 1 page 6 para 3

³⁹² Amnesty International, *Hotspot Italy; How the EU's Flagship Approach leads to violations of Refugee and Migrant Rights*, London, 2016, Page 14, Para 3, <http://www.amnesty.hu/data/file/3061-hotspot-italy-final-web.pdf?version=1415642342> (accessed 17/8/2017 18.03) page 5 para 2

is an area at the EU's external border that faces disproportionate migratory pressure.³⁹³ Most irregular migrants enter the Union through these hotspots.³⁹⁴

Pressured by EU institutions and other member states to abide by state obligations under the Dublin Regulations, the Italian government has been arm-twisted into violating international law when dealing with migrants at the hotspots.³⁹⁵ Firstly, in its pursuit of a "100% identification rate", the "Hotspot" approach has pushed Italian authorities over what is permissible under international human rights law.³⁹⁶ The implementation of coercive measures to force uncooperative individuals to provide their fingerprints has increasingly become the rule, through prolonged detention and use of physical force.³⁹⁷ It's against this backdrop, that refugees and migrants unwilling to give their fingerprints have been subjected to arbitrary detention and ill-treatment by police.³⁹⁸ Whilst the vast majority of police abide by international human rights standards, consistent testimonies collected by Amnesty International indicate that some engaged in excessive use of force, cruel, inhuman or degrading treatment, or even torture.³⁹⁹

Secondly, the "hotspot" approach also requires the introduction of an early, swift screening of the status of all individuals disembarked in Italian ports, to separate those believed to be "genuine" asylum-seekers from others believed to be irregular migrants.⁴⁰⁰ A screening process is conducted that isn't based on any legislation and performed in haste (when individuals are still too tired or traumatised by the journey, before they have had a chance to receive adequate information regarding their rights and the legal consequences of their declarations).⁴⁰¹ This *modus operandi* risks denying people fleeing conflict and persecution access to the protection they have a right to.⁴⁰² The emphasis by European institutions and governments on the

³⁹³ ECA op cit note 146 page 14 para 11

³⁹⁴ Ibid

³⁹⁵ Amnesty International op cite note 392 page 15 para 3

³⁹⁶ Ibid page 6 para 4

³⁹⁷ Amnesty International op cite note 392 page 6 para 4

³⁹⁸ Ibid

³⁹⁹ Ibid

⁴⁰⁰ Ibid para 5

⁴⁰¹ Ibid

⁴⁰² Ibid

need to increase expulsions has led to thousands of orders to leave the country following the above mentioned, flawed screening.⁴⁰³

Claude Moraes, chair of the European Parliament's Justice and Home affairs Committee, described the ECA Report on the Italian hotspots as "an alarm bell being rung" about the failures of EU states.⁴⁰⁴

Below is an examination of international law potentially violated in the implementation of the "Hotspot" approach:

THE "HOTSPOT" APPROACH AND INTERNATIONAL LAW

a) RIGHTS OF THE CHILD

As of April 2017, there were at least 20,500 children, predominantly from African states in the Italian hotspots.⁴⁰⁵ An appalling issue is the detention of unaccompanied minors in hotspots for prolonged periods of time with adults as specialised shelter capacity remains limited.⁴⁰⁶

"The amount of child abuse, rape and smuggling that is going on is horrific," "If the EU is to have any sort of value it has to care for unaccompanied minors when they arrive in Europe." Claude Moraes⁴⁰⁷

APPLICABLE INTERNATIONAL LAW

Article 3 of the Convention on the Rights of the Child (CRC) unequivocally mandates public or private welfare institutions, courts of law, administrative authorities or legislative bodies to make the best interests of the child a primary consideration in all actions concerning children.⁴⁰⁸

It's plausible, corroborated by the support of a significant number of scholars that the best interest of the child principle now transcends the CRC and forms customary

⁴⁰³ Ibid para 6

⁴⁰⁴ Arthur Neslen, 'Horrific' levels of child abuse in unsafe refugee camps, warns EU, The Guardian Newspaper, London, 24th April, 2017 para 17 <https://www.theguardian.com/global-development/2017/apr/24/eu-urgent-protection-23000-unaccompanied-child-refugees-squalid-camps-greece-italy> accessed 16/8/2017 at 17.12

⁴⁰⁵ Neslen op cit note 404

⁴⁰⁶ Dutch Council for Refugees (DCR) *The Implementation of the Hotspots in Italy and Greece, A Study*, Amsterdam, December 2016 page 52 para 3 <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf> (accessed 18/8/2017 12.36)

⁴⁰⁷ Ibid para 4

⁴⁰⁸ UNGA, *Convention on the Rights of the Child*, 1989

international law.⁴⁰⁹ The Committee on the Rights of the Children emphasises that individual decisions taken by administrative authorities in the areas of care, health, living conditions, protection, asylum, immigration among others must be assessed and guided by the best interests of the child.⁴¹⁰

Furthermore Article 37 a) of the CRC stipulates that children shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment⁴¹¹ while Article 37 b) directs that children shall not be deprived of their liberty unlawfully and arbitrarily.⁴¹²

The treatment of children by the EU in the hotspots as highlighted above feasibly amounts to breach of customary international law as well as international treaty law by the EU and Italy.

b) RIGHT TO SEEK AND ENJOY ASYLUM

The police are essentially tasked to do a first selection of those in need of protection hence placing a disproportionate level of responsibility upon an authority not competent or trained to do such work.⁴¹³ The border guards operate a rapid distinction between *prima-facie* “refugees” and economic migrants, with the latter immediately expelled without the possibility of a case-by-case decision as The Refugee Convention demands.⁴¹⁴ Most migrants don’t reach the actual venues from where they may seek asylum.⁴¹⁵ On many occasions people aren’t aware at pre-identification that they are asked to state the intention to seek asylum. Lastly, The number of interpreters and cultural mediators is insufficient.⁴¹⁶

APPLICABLE INTERNATIONAL LAW

International law applicable to Asylum is expansively discussed under Chapter 2:1:1:1. The UNHCR and the OHCHR have stressed that the right to seek asylum is

⁴⁰⁹ Rhona KM Smith, *Texts and Materials on International Human Rights*, Routledge, New York, 2013

⁴¹⁰ Committee on the Rights of the Children, *General comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration* (Art. 3, Para. 1) page 9 para 30 http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (accessed 5/9/2017 22.17)

⁴¹¹ UNGA supra note 408 Article 37(a)

⁴¹² Ibid Article 37(b)

⁴¹³ DCR op cite note 406 page 51 para 2

⁴¹⁴ Valeria Bello, *International Migration and International Security; Why Prejudice is an International Security Threat*, Routledge, New York, 2017 page 56 para 1

⁴¹⁵ Ibid page 56 para 4

⁴¹⁶ DCR op cite note 406 page 51 para 8

an individual right that needs to be assessed case by case by a judicial court.⁴¹⁷ The EU as per Bello is currently applying the right to international protection as a “collective” right.⁴¹⁸

The mode of conducting asylum applications highlighted above feasibly amounts to a violation of the right to seek and enjoy asylum. The EU and Italy are plausibly liable for the breach of international law.

c) NON-REFOULEMENT AND RE-ADMISSIONS

In Italy, many return decisions have been issued based on the information provided in the pre-identification phase and the assumption that certain nationalities are not in need of protection.⁴¹⁹ In addition to existing re-admission agreements, Italy has started concluding Bi-lateral co-operation agreements such as those with Gambia and Sudan that enable swift returns of individuals in an unlawful and non-transparent manner.⁴²⁰

As already discussed extensively above (State the Sub-Section) Non-refoulement is arguably the very cornerstone of international refugee protection. Its enshrined under The Refugee Convention, generally recognised as Customary International Law and is even entrenched in EU law.

The practice of re-admissions of Italy plausibly amounts to a violation of the principle of non-refoulement. The EU and Italy potentially bear legal liability for this under international law.

d) TORTURE, CRUEL, INHUMANE AND DEGRADING TREATMENT

Some migrants interviewed by Amnesty International reported being subjected to torture to coerce them into giving their fingerprints. These included allegations of beatings causing severe pain, sexual humiliation and infliction of pain to the genitals.⁴²¹ In a number of other cases, people recounted having been subjected to electric shocks by the police through electrical batons (stun batons), weapons that

⁴¹⁷ Bello op cit note 414 page 58 para 1

⁴¹⁸ Ibid

⁴¹⁹ DCR op cite note 406 page 52 para 6

⁴²⁰ DCR op cite note 406 page 52 para 7

⁴²¹ Amnesty International op cite note 392 page 17 para 4

inflict significant pain without leaving long-lasting physical traces on bodies.⁴²² Others stated that they had been denied food and water while kept under police custody, to force them into giving their fingerprints or as a form of punishment for resisting fingerprinting.⁴²³

Reception capacity and conditions in Italian hotspots remain insufficient and are largely below standard.⁴²⁴ The material conditions in the camps (quality of food, shortage of blankets, lack of privacy, inadequate access to medical care, water shortages, etc.) have been criticised by NGOs like Amnesty International, Human Rights Watch, and Save the Children.⁴²⁵ As early as 2014, the ECtHR stated that given the deficiencies of the Italian asylum reception system, the transfers of certain vulnerable persons such as children or families from other EU states to Italy in fulfillment of the Dublin Regulations may raise issues in respect of Article 3 ECHR (prohibition of torture, inhuman and degrading treatment)⁴²⁶

APPLICABLE INTERNATIONAL LAW

The CAT defines torture as;

Any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁴²⁷

The prohibition against torture is now so widely recognised as a crime in customary international law, with a status of *jus cogens*.⁴²⁸ The CAT further criminalises acts of cruel, inhuman or degrading treatment or punishment whose threshold falls short of torture when such acts involve public officials or persons acting in official capacities.

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⁴²² Ibid para 10

⁴²³ Ibid page 22 para 2

⁴²⁴ DCR op cite note 406 page 52 para 4

⁴²⁵ ECA op cit note 146 pages 27-28

⁴²⁶ European Commission op cit note 332

⁴²⁷ UNGA supra note 106 Article 1(1)

⁴²⁸ ICTY, *Prosecutor Vs. Anto Furundzija* IT-95-17/1-T10 (1998, Paras 153-154 <http://www.icty.org/x/cases/furundzija/tjug/en/> (accessed 5/9/2017 19.47)

⁴²⁹ UNGA supra note 106 Article 16(1)

A juxtaposition of the above actions and omissions of the EU and Italy with the applicable international law portrays that the 2 entities are plausibly liable for the violation of provisions of the CAT as well as customary international law in relation to the right to freedom from torture, cruel and inhuman treatment.

e) DETENTIONS AND THE RIGHT OF LIBERTY

Detention is used as a key measure to ensure the hotspots function.⁴³⁰ In Italy prolonged detention often exceeding 48 hours is used as a coercive measure to ensure fingerprinting.⁴³¹ According to the Italian Prisons Ombudsman, the average length of detention of migrants is 15 days in Lampedusa and 10 in Taranto.⁴³²

APPLICABLE INTERNATIONAL LAW

3 inter-related norms limit the decision to detain⁴³³; 1) the prohibition against arbitrary detention or deprivation of liberty,⁴³⁴ 2) the right to freedom of movement,⁴³⁵ and 3) the right to liberty and the security of the person.⁴³⁶ These 3 protections have been interpreted in the context of migration detention and all apply equally to non-citizens present in the territory of the relevant human rights treaty signatories, whether or not they are irregular migrants.⁴³⁷

The UN Human Rights Committee (UNHRC) has made clarification in relation to Article 9 of the ICCPR (prohibition against arbitrary detention or deprivation of liberty).⁴³⁸ The UNHRC⁴³⁹ decided that Australia arbitrarily detained an immigrant when it failed to engage in an individualised analysis before making the decision to detain.⁴⁴⁰ It's noteworthy that the international community has renewed its

⁴³⁰ DCR op cit note 406 page 51 para 9

⁴³¹ DCR op cit note 406 page 51 para 9

⁴³² Corallina Lopez Curzi, *Guilty of Travelling: When Immigration Detention is Worse than Prison*, Oxford University, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/07/guilty-travelling> (accessed 20/10/17 13.40)

⁴³³ Chetail & Bauloz op cit note 72 page 181 para 2

⁴³⁴ UNGA (UDHR) supra note 77, Article 9(1)

⁴³⁵ UNGA (UDHR) supra note 77, Article 13; UNGA supra note 81 (ICCPR) Article 12

⁴³⁶ UNGA (UDHR) supra note 77 Article 3; UNGA (Refugee Convention) supra note 5, Article 31; UNGA, *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, Article 9

⁴³⁷ UNHRC, General Comment No.31: *The Nature of the General Legal Obligations imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13. 21 April 2004, Para 10

⁴³⁸ Chetail & Bauloz op cit note 72 page 182 para 2

⁴³⁹ HRC, *A Vs. Australia*, UN Doc. CCPR/C/59/D/560/1993/3 April, 1997

⁴⁴⁰ UNHRC op cit note 437 para 9.4

attention to alternatives to detention.⁴⁴¹ The UN General Assembly members in the 2016 New York Declaration for Refugees and Migrants committed to pursuing alternatives to detention while assessing the legal status of individuals who have crossed or who are seeking to cross international borders.⁴⁴² It's arguable that the Declaration is "soft law" governing the detention of migrants. Perhaps as an exposé of the double standards of the EU in relation to detention specifically is the fact that the European Commission recognises the need for alternatives to detention in particular for women and minors in Libya.⁴⁴³

A juxtaposition of the widespread practice of arbitrary prolonged detention of migrants and asylum-seekers in Italy with the applicable international law makes it very conceivable that the EU and Italy are liable for the violation of international law.

Below is a demonstration of how Italy and the EU are legally liable under international law in relation to the "Hotspot" Approach.

LEGAL LIABILITY OF ITALY AND THE EU

ITALY

As per Article 2 of the DASR,⁴⁴⁴ there's an internationally wrongful act of a State when conduct consisting of an action or omission a) is attributable to the State under international law; and b) constitutes a breach of an international obligation of the state. The following actions and omissions of Italy constitute the latter; not acting in the best interests of children, denying the right to asylum to asylum-seekers, refoulement, perpetrating torture, cruel and inhumane treatment. These actions are attributable to the Italian state because they are perpetrated by Italian border guards and Police. Italy is hence liable for the commission of internationally wrongful acts.

THE EU

The liability of the EU emanates from Article 14 of the DARIO. The EU by partnering with Italy in the "Hotspot" Approach has and continues to aid and assist Italy in the commission of the internationally wrongful acts discussed above like denying

⁴⁴¹ Chetail & Bauloz op cit note 72 page 182 para 2

⁴⁴² UNGA, *New York Declaration for Refugees and Migrants*, 3 October 2016, A/RES/71/1, <http://unact.org/publication/view/new-york-declaration-for-refugees-and-migrants/> (accessed 9/8/2017 21.32)

⁴⁴³ European Commission op cit note 21 page 10 para 3

⁴⁴⁴ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001

asylum-seekers the right to seek asylum, refoulement, torture, cruel, inhumane and degrading treatment, etc. The EU in line with Article 14 of the DARIO is hence internationally responsible because it conceivably does so with the knowledge of the circumstances of the internationally wrongful act. Moreover, the acts committed by Italy, if committed by the EU would be internationally wrongful.

It's plausible that an argument could be made that Italy and the EU are acting within the confines of international law in respect to the violation of derogable (non-absolute) provisions of international treaty law. The author hence finds it relevant to argue that the conditions that would permit Italy and the EU to legally violate the derogable provisions of international treaty law have not been met.

5:4 DEROGATIONS OF INTERNATIONAL HUMAN RIGHTS

Plausibly all the potential international law violations by the EU and Italy under the EAM are international human rights. Generally, the bulk of these rights are derogable. However, there are strict conditions under which they legally be derogated.

Derogations allow states parties to adjust some of their obligations under the treaty in exceptional situations⁴⁴⁵ which one may argue the EU migration “crisis” is. However, the existence of a situation amounting to a public emergency is a fundamental requirement for triggering the derogation clause.⁴⁴⁶ States must officially proclaim a state of emergency, and notify the relevant international supervision body of the treaty, the reasons for derogation and the measures taken.⁴⁴⁷ Neither the EU nor any member state has fulfilled these conditions.

It's noteworthy that the EU and Italy are potentially liable for the commission of torture and refoulement, considered to be *jus cogens*⁴⁴⁸ most especially in relation to torture. Acts considered *jus cogens* are non-derogable.⁴⁴⁹

CHAPTER CONCLUSION

⁴⁴⁵ Geneva Academy, *What are derogations” International Human Rights Law*, , <http://www.rulac.org/legal-framework/international-human-rights-law#collapse2accord> (accessed 23/9/2017 14.58)

⁴⁴⁶ Ibid

⁴⁴⁷ Ibid

⁴⁴⁸ Bennet and Strug op cite note 95 page 27

⁴⁴⁹ Ibid

The Chapter thoroughly analysed the compatibility of the EAM (Immediate Action) with international law. It was found that only the second immediate action (targeting criminal smuggling networks) and the third one (the relocation plan) fully conform to international law. The fourth immediate action (Resettlement plan) complies with international law to a large extent though it contravenes it to a small extent. The rest of the immediate actions i.e. saving lives at sea, working in partnership with African countries and using the EU's tools to help frontline states contravene international law.

CHAPTER 6: THESIS CONCLUSION

The main research question of the thesis, answered in Chapter 5 was whether the EAM (Immediate Action) aimed at curbing the Africa-EU migration “crisis” complies with international law. In order to interrogate the main research question, it was expedient to answer some preliminary research questions in the preceding chapters (Chapters 2 to 4) mainly in the areas of migration, state sovereignty, asylum, the EU and the Africa-EU irregular mass-migration. The answers obtained from Chapters 2-4 were crucial for laying the foundation for tackling the main research question in Chapter 5.

Chapter 1 offered a comprehensive introduction for the thesis whilst elaborating how the paper is structured.

Chapter 2, in an attempt to understand the EU immigration law and policies generally considered “harsh” to foreigners investigated the relationship encompassing migration, state sovereignty, asylum and the EU. The Chapter found that state sovereignty is the most consequential factor as far as the migration laws and policies of states are concerned. The “Fortress Europe” EU immigration law and policy is hence generally due to the exercise of state sovereignty by the EU member states. It was acknowledged that to a very limited extent, state sovereignty in relation to migration today, is most significantly impinged by; human rights, international law and the inter-dependence of states. After an examination of asylum, it was established that there’s no right to be granted asylum under international law. It was also found that the principle of non-refoulement is generally considered to constitute customary international law and is plausibly the most consequential legally binding obligation that states have in relation to migration and asylum under international law. Lastly, a review of the EU found that it’s a *sui generis* supranational organisation in which competence in the area of immigration is shared amongst member states and the EU. Additionally, the EU was founded on the values of human rights, rule of law and democracy, positing itself as a global champion of the aforementioned ideals. Therefore, the standard to which the EU is held in relation to the respect, protection and fulfilment of the above ideals is justifiably high.

Chapter 3 argued that it's imperative that the appropriate migration terminology is used in the migration discourse, in light of which, the fundamental terms in the migration discourse were defined i.e. migrants, illegal migrations, "illegal" migrants, irregular migrations, refugees and asylum-seekers. Critically, while evaluating the Refugee Convention, it was found that the Convention by virtue of being Eurocentric, racist, individualistic, parochial, androcentric is inherently defective. This makes it unfit for purpose in relation to the refugee and asylum situation today. Moreover, the defectiveness has contributed to the precipitation of the current global refugee crisis.

Chapter 4 confirmed that there's an on-going Africa-EU irregular mass-migration. Generally, the push factors were identified as war and poverty. Family reunification, entrepreneurship, knowledge and education constitute the pull factors. The generally recognised routes that collectively facilitate the Africa-EU irregular migration were found to be the Western Mediterranean, Central Mediterranean and West African Routes. It was acknowledged that the current instability in Libya has made the country the principal departure point for persons involved in the migration. Lastly, it was found that the Central Mediterranean Route is currently the biggest enabler of the EU migration "crisis" after the EU "shut down the Eastern Mediterranean and West Balkans routes that previously also facilitated the EU migration "crisis".

Chapter 5 tackled the main research question. It was found that the EAM (Immediate Action) complies with international law to a limited extent. To a greater extent, it's incompatible with international law. Only the second and third immediate actions fully comply with international law. Under the second one, the EU acquired UN Security Council authorisation prior to the use of force in the Mediterranean. The EU and member states have also respected the territorial sovereignty and political independence of Libya in the conduct of operations in the Mediterranean. Relating to the third immediate action (relocation); the relocation plan under the EAM is in accordance to the UNHCR guidelines on relocation and hence conceivably in compliance with international law though the plan has generally been considered a failure due to lack of co-operation of the EU member states. The Resettlement plan (fourth immediate action) generally doesn't violate international law, resettlement being an activity that's governed by state sovereignty, outside the scope of international law. Nonetheless, considering that the EAM Resettlement plan favours Syrian refugees over all other refugees, it amounts to discrimination contrary to

international law (Refugee Convention). The rest of the immediate actions generally contravene international law. The failure to prioritise the saving of lives of asylum-seekers and migrants in distress at sea (first Immediate Action) plausibly violates customary international law and international treaty law. The EU migration partnerships with African states (fifth Immediate Action) credibly violate international treaty law, customary international law and *jus cogens*. The “Hotspot” Approach, a fundamental component of the EU Tools for helping frontline states (sixth Immediate Action) feasibly contravenes international treaty law, customary international law and *jus cogens*. From the findings of the Chapter, a case can viably be made that the EAM (Immediate Action) addressing the Africa-EU irregular mass-migration to a large extent contravenes international law.

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ANNEXES

FIGURE 1: Migratory Routes Map⁴⁵⁰

⁴⁵⁰ Frontex, Migratory Routes Map, <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/> (accessed 10/11/2017 10.12)

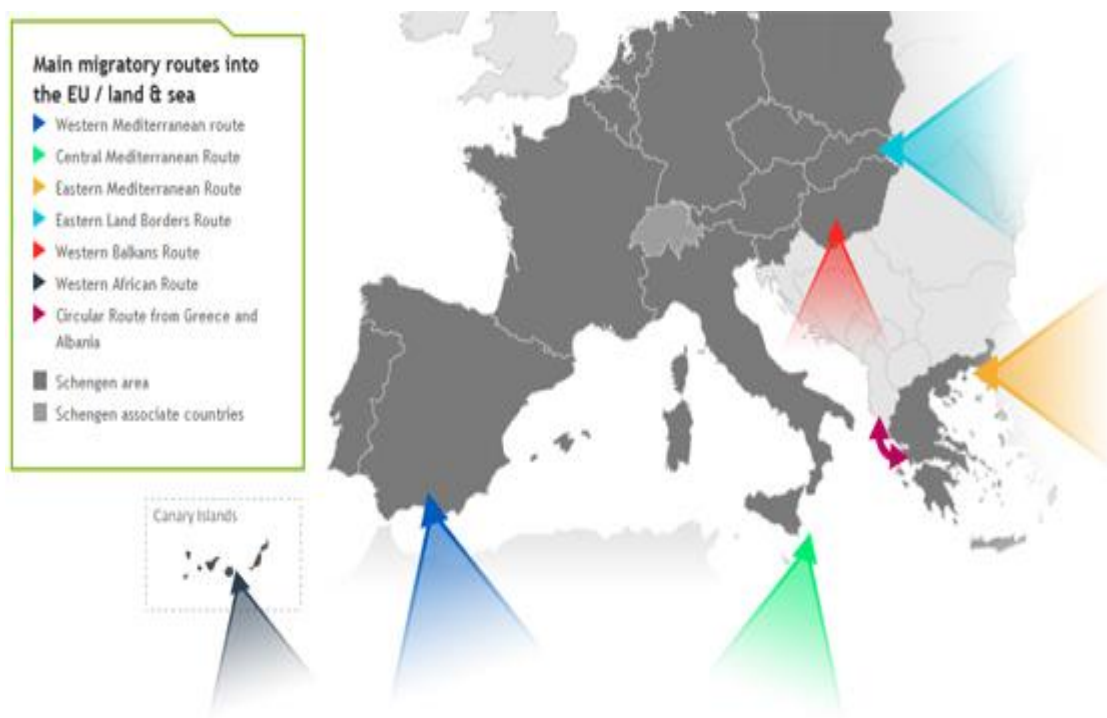


TABLE 1; Total Arrivals by Sea and Deaths in the Mediterranean 2015-2016⁴⁵¹

⁴⁵¹ IOM, *Mediterranean migrant arrivals reach 345,440; deaths at sea: 4,655*, <https://missingmigrants.iom.int/mediterranean-migrant-arrivals-reach-345440-deaths-sea-4655> (accessed 10/11/2017 9.34)

TOTAL ARRIVALS BY SEA AND DEATHS IN THE MEDITERRANEAN 2015-2016				
1 JANUARY – 22 NOVEMBER 2016			1 JANUARY – 30 NOVEMBER 2015	
Country of Arrival	Arrivals	Deaths	Arrivals	Deaths
Italy	168,542	4,164 (Central Med. route)	144,205	3,565* (all Med routes)
Greece	171,264	429 (Eastern Med. route)	739,188	
Cyprus	189		na	
Spain	5,445 (as of 30 September)	62 (Western Med route)	na	
Estimated Total	345,440	4,655	883,393	3,557*

<p>* Up to 22 November 2015</p>	<ul style="list-style-type: none"> • Data on deaths of migrants compiled by GMDAC. • All numbers are minimum estimates. • Arrivals based on data from respective governments and IOM field offices.
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TABLE 2: The Total Arrivals by Sea and Deaths in the Mediterranean 2016-2017⁴⁵²

⁴⁵² IOM, *Mediterranean Migrant Arrivals Reach 131,772 in 2017; Deaths Reach 2,556, 19th September 2017*, <https://www.iom.int/news/mediterranean-migrant-arrivals-reach-131772-2017-deaths-reach-2556> (accessed 11/10/2017)

MEDITERRANEAN DEVELOPMENTS

TOTAL ARRIVALS BY SEA AND DEATHS IN THE MEDITERRANEAN 2016-2017				
	1 JANUARY – 8 OCTOBER 2017		1 JANUARY – 8 OCTOBER 2016	
Country of Arrival	Arrivals	Deaths	Arrivals	Deaths
Italy	107,028	2,570 (Central Med. route)	144,445	3,155 (Central Med. route)
Greece	20,364 (as of 07/10)	46 (Eastern Med. route)	167,972	415 (Eastern Med. route)
Cyprus	818		345	
Spain	12,328	138 (Western Med. route)	5,445 (as of 30/09/16)	116 (Western Med. route)
Estimated Total	140,538	2,754	318,207	3,686
Data on deaths of migrants compiled by IOM's Global Migration Data Analysis Centre. All numbers are minimum estimates. Arrivals based on data from respective governments and IOM field offices.				